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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

OF THE

STATE OF MISSOURI

REPORTED FOR THE

ST. LOUIS COURT OF APPEALS

July 18, 1916, to February 6, 1917.

BY THOMAS E. FRANCIS of the St. Louis Bar.

FOR THE

KANSAS CITY COURT OF APPEALS

January 29, 1917, to June 11, 1917.

BY JOHN M. CLEARY of the Kansas City Bar.

AND FOR THE

SPRINGFIELD COURT OF APPEALS

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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

MARCH TERM, 1916.

(Continued from Volume 195.)

DeMUN ESTATE CORPORATION, Respondent, v. FRANKFORT GENERAL INSURANCE COMPANY, Appellant.

St. Louis Court of Appeals, July 18, 1916.

1. **INSURANCE: Construction of Policies.** The language employed in an insurance policy is to be construed in aid of the insurance, rather than to the end of defeating it, and the policy is to be given effect, if permissible, as if it was intended to cover and include the subject of the insurance for which the premium was paid, rather than to aid an escape from liability thereon.

2. ———: **Landlord's Contingent Policy: Construction.** A "landlord's contingent policy" stipulated for indemnification against expenditures made by the owner of a building, in liquidation of claims for personal injuries sustained by reason of defects in the building or negligence of the owner, chargeable to him at law, provided he was not in the actual occupation or control of the building and that such actual occupation or control was vested in a lessee or lessees. The entire building was under lease to several tenants, some occupying more space than others, but every part of the habitable portions of the building was let to and occupied by tenants. The cornice of the roof fell and injured pedestrians on the street, and the owner

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settled the claims growing out of such injuries. In an action on the policy, insurer defended on the theory that the actual occupation or control of the cornice was not vested in the lessees, but that it was occupied and controlled by insured, so that the condition set forth in the policy, upon which the insurance was payable, did not obtain. *Held*, that this condition relates to the habitable portions of the building, and not merely to the roof or the cornice, and that insured did not "occupy" or "control" the roof or cornice within the meaning of the condition, and hence it is *held* that the policy afforded indemnification for the expenditures made in settlement of the claims.

3. **NEGLIGENCE: Res Ipsa Loquitur: Falling Cornice.** The fall of a cornice from the roof of a building, on a quiet evening, when the speed of the current of air did not exceed three miles per hour, injuring a person on the street, would alone lead to an inference of neglect of duty, under the *res ipsa loquitur* rule, which would suffice as a prima-facie showing of negligence and cast upon the defendant the burden of rebutting it.

4. **INSURANCE: Landlord's Contingent Policy: Prerequisite to Recovery: Defective Condition of Building.** In order to warrant a recovery under a "landlord's contingent policy," which stipulated for indemnification against expenditures made by the owner of a building, in liquidation of claims for personal injuries sustained by reason of defects in the building or negligence of the owner for which he was chargeable at law, provided, however, that he was not in the actual occupation or control of the building and that the actual occupation or control thereof was vested in a lessee or lessees, it was essential for insured to show that the defective condition of the building which caused the injuries existed at the time the tenants were given possession, since insured, as owner of the property, would not be "chargeable at law" for a defect that subsequently came into existence.

5. ———: ———: ———: ———: **Sufficiency of Evidence.** In an action on such a policy, evidence *held* sufficient to support a finding that the building was in a defective condition at the time the tenants took possession of it, and that such defect constituted negligence on the part of insured, as owner of the property, which was chargeable to him at law, so as to make insurer liable, under the policy, for expenditures made by insured in liquidation of claims for personal injuries sustained by reason of such defects.

6. ———: ———: ———: ———: **Change of Ownership.** Where, at the time such a policy was issued, the building covered thereby was owned by the heirs of an estate, who thereafter formed a corporation to which the property was conveyed, the heirs being given stock representing their proportionate interests in the estate, one of them being made president and another secretary and treasurer, etc., and the policy was changed so as to make the corporation the

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assured, insurer was not relieved from liability for expenditures made by the corporation in liquidation of claims for personal injuries sustained by reason of defects in the building, negligently permitted to exist, on the theory that the building had been leased prior to the organization of the corporation and that it took title thereto subject to the leases, and, therefore, that it was not liable to the persons injured, since the organization of the corporation amounted to no more than encasing the estate in a corporate charter and neither in spirit nor in substance was there any charge of ownership.

7. **CORPORATIONS: Holding Company: Rights and Liabilities.** Where the owners of property organize a corporation, to which the property is conveyed, and take stock therein, in proportion to their respective interests in the property, there is no change of ownership, either in spirit or substance, so that there is no change of rights or liabilities, with respect to the property.

8. **COMMON LAW: Operation.** The common law heeds the substance, rather than the shadow, of things.

Appeal from Lincoln Circuit Court.—*Hon. Edgar B. Woolfolk,* Judge.

AFFIRMED.

Holland, Rutledge & Lashly for appellant.

L. L. Leonard, R. H. Norton and *Grover C. Sibley* for respondent.

(1) The evidence conclusively showed that respondent was not in "actual occupation" of any part of the premises, and hence there was no violation of the conditions of the rider. 3 Joyce on Insurance, p. 2213; Craig v. Sp'g. F. & M. Ins. Co., 34 Mo. App. 484. (2) "Control" (or "occupation") of the roof and walls of the building, when all habitable parts were leased, and was not "control" (or "occupation") "of the property," within a fair interpretation of the rider and policy. Still v. Conn. F. Ins. Co., 172 S. W. 626; Herman v. Adriatic Co., 85 N. Y. 162; Harrington v. Fitch Mutual, 124 Mass. 126; Carter v. Humboldt Co., 17 Iowa 456. (3) Counsel errs in arguing that "if respondent were not in possession (occupation?) and control of any portion of the premises

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at the time the cornice in question fell, respondent would not be liable to the injured parties for the fall thereof." By the contract of Sept. 13, 1910, appellant is estopped from making this contention. Furthermore, a lessor is liable in law for damages from an existing nuisance and for this reason respondent was liable for these damages due to his neglect and chargeable to him by law. Felhauer v. St. Louis, 178 Mo. 646; Mitchell v. Brady, 124 Ky. 411; Glenn v. Hill, 210 Mo. 298; Stoetzels v. Swearingen, 90 Mo. App. 593; Kaiser v. Washburn, 55 App. Div. 161. (4) The fact that the DeMun estate was incorporated in the latter part of 1909 is of no importance whatever. The same interests remained, represented by the same agents and under the same management. Wrapping about an individual a corporate charter does not change the identity of the individual. Bradshaw v. Halpin, 180 Mo. 666. (5) Occupation and control of the roof of a building by the owner is not in violation of a policy issued "with the understanding that the assured is the owner of the property but is not in occupation or control of it," i. e., of the property. If in anywise possible, the policy will be construed so as to effectuate the insurance. La Farce v. Ins. Co., 43 Mo. App. 519; Carr v. Hibernia Ins. Co., 2 Mo. App. 466; Reun v. Supreme Lodge, 83 Mo. App. 442; Sims v. State Ins. Co., 47 Mo. 54; Alt. Est. v. Casualty Co., 149 S. W. (Mo.) 1049; Miller v. Mo. Ins. Co., 153 S. W. 1080 (Mo. 1913); Harrington v. Fitchburg Ins. Co., 124 Mass. 126. (6) The falling of a part of a building overhanging a public thoroughfare is prima-facie negligence on the part of those responsible in law for its safe maintenance. Tiffany, Landlord & Tenant, pp. 692, 693; Muellen v. St. John, 57 N. Y. 567; Railroad v. Hopkins, 54 Ark. 213; McNulty v. Ludwig, 125 App. Div. 292; Israel v. Unit. Rys. Co., 155 S. W. (Mo.) 1092; McAdam v. Street Ry., 174 Mo. App. 5; Blounts v. Dodd, 109 Mo. 69-74; Mitchell v. Brady, 124 Ky. 416. (7) The terms of the contract of insurance are strictly construed against the insurer. Walton v. Phoenix Ins. Co., 162 Mo. App. 316; La Farce v. Williams Ins. Co., 43 Mo. App. 530;

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Starke v. Insurance Co., 176 Mo. App. 581; Mitchell v. Accident Ins. Co., 179 Mo. App. 5; Renn v. Ins. Co., 83 Mo. App. 449.

NORTONI, J.—This is a suit on a policy of insurance. Plaintiff recovered and defendant prosecutes the appeal.

The insurance contract is what is known as a landlord's contingent policy. It vouchsafes indemnity to the owner of the building, who is neither in the occupation nor control of it, for such expenditures as he may make in liquidation of claims arising on account of personal injuries received because of defects in the building or the neglect of the owner which are chargeable to him at law. The building on which the policy covers is situate on the west side of North Sixth street in St. Louis, between Olive and Pine, numbered 207, 209, 211, 213, and 215. It consists of three stories, is constructed of brick, and is known as the Mona hotel. It is an old building, having been erected about 1843, and was occupied first by DeMun as a residence. About 1855, it was converted into business property, but during all the time has continued as the property of the DeMun estate—that is, it was owned by the heirs of Isabel DeMun. The policy was originally issued to Julius S. Walsh, agent for himself and the other heirs, on the 20th day of December, 1909, for one year—that is, to December 20, 1910. In the meantime, the interests of all of the heirs in the property were incorporated in the name of DeMun Estate Corporation, the plaintiff, and on January 28, 1910 the change of the name of the owner was indorsed on the policy as follows:

"It is hereby understood and agreed that the name of the assured in this policy is changed to read DeMun Estate Corporation, and ceasing to cover in the name of Julius S. Walsh, agent for himself and other owners as originally written."

At the time the policy was issued, and, indeed, at all times relevant to the questions for consideration here, the building was in possession of tenants. William J.

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Milford was the lessee under a lease of date June 29, 1908, for a period of four years of all of the second and third floors of the building and also the storerooms numbered 207, 209 North Sixth street—that is, on the ground floor, in which Milford conducted a hotel, the Mona House, and restaurant. Moreover, it appears Milford had possession of a small basement under the building as well. Joseph Fireside & Company were the lessees under a lease of date August 12, 1907, for a period of five years, of storerooms numbered 211, 213 North Sixth street, on the ground floor, while one Joyce was a tenant and occupied the remaining storeroom—that is, number 215 North Sixth street—as a dramshop. With the property thus occupied, the policy was issued to the heirs of the DeMun estate, Julius S. Walsh, agent, and continued in force under the change of name after the incorporation of the estate as above indicated.

On a quiet evening in June, 1910, a considerable portion of the cornice on the front of the building fell from position into the street and injured several pedestrians. Plaintiff expended about $3700 in settlement of the claims of persons so injured, preferred against it, and sues upon the policy for indemnity.

It is argued the subject-matter in suit is not within the terms of the policy, for that plaintiff owner was in possession and control of the roof of the building and the cornice which fell, whereas the policy stipulates indemnity only in those cases where the insured is not in such possession and control. The question thus made is to be determined by a construction of the following provision of the policy:

"This policy is issued with the understanding that the assured is the owner of the property but is not in occupation or control of it, the actual occupation or control being vested in a lessee or lessees, and it is hereby agreed that the company shall not be responsible for any loss, excepting such as may be occasioned by some fault or neglect on the part of the assured, or may be chargeable to him by law, notwithstanding the fact

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that the property is leased or beyond his control, and this policy is accepted by the assured accordingly."

We regard the argument as more specious than sound, in that it reckons with the words "occupation or control," contained in the policy apart from the entire property as tenements, and seeks to confine them to a mere infinitesimal portion of the subject-matter insured —that is, to the roof, or, rather, the cornice which fell to the ground and injured the several pedestrians. Moreover, the argument proceeds in the view that the word "occupation" is synonymous with the word "possession," which is in no wise true, and as if possession intends, in part at least, a constructive possession which draws to it the right of control touching the cornice. It appears that every part of the building—that is the habitable portions—was let to and occupied by tenants at the time the policy was issued and throughout the whole period involved here. This being true, no portion of it was in the "occupation or control" of the owner according to the intendment of the policy contract, when interpreted under the principle of law relevant to insurance matters. No one can doubt that the language employed in an insurance policy is to be construed in aid of the insurance rather than to the end of defeating it, for, indeed, the insurance vouchsafed is the very object and purpose of the contract. [See Stix v. Travelers' Indemnity Co., 175 Mo. App. 171, 177, 157 S. W. 870.] Moreover, the policy is to be given effect, if permissible, as if it was intended to cover and include the subject of the insurance for which the premium was paid, rather than to aid an escape from liability thereon. [See Still v. Connecticut Fire Ins. Co., 185 Mo. App. 550, 172 S. W. 625.]

The provision above copied proceeds, "This policy is issued with the understanding that the insured is the owner of the *property,* but is not in occupation or control of *it,* the actual occupation or control being vested in a lessee or lessees." (The italics are our own.) In so far as these words are concerned, they relate to the *property* and not merely to the roof or the cornice. It is certain that this *property,* considered as the subject-matter insured, was not in the occupation or control of

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the owner, for it was under lease and occupied by the several tenants, and, indeed, the leases stipulate that it was given over to the lessees in its present condition without any obligation on the landlord to make repairs for their benefit.. Obviously, plaintiff owner did not occupy the roof of the building nor the cornice, and it cannot be said in the sense of the policy that it even controlled them. Whether Milford, who occupied two of the storerooms on the ground floor as a restaurant, and the second and third stories of the building as a hotel, is to be regarded as in the occupation and control of the roof and cornice as appurtenances to his tenement, is immaterial under this policy, for it is clear plaintiff was neither in the occupation nor the control of the *property*, that is, the habitable portions of it, which as a whole is the subject of the insurance. The concluding words of the provision of the policy above copied—that is, the words "notwithstanding the fact that the *property* is leased or beyond his (the owner's) control"—imply too, that the stipulation relates to the property as property for the uses intended, rather than to a mere isolated portion, such as the roof or the cornice, which in no sense is either occupied or controlled at all for the uses of either the tenant or the landlord. In this view, the subject-matter in suit—i. e., the payments made to the injured persons—is clearly within the terms of the policy, and it is unnecessary to consider the argument directed against the instruction touching the question as to the occupation or control, for the court should have directed as a matter of law that plaintiff was not in the occupation or control of the cornice which fell, in that all the habitable portions of the property were in the occupation and control of the tenants.

But it is argued that though such be true, it does not sufficiently appear that the damages liquidated by plaintiff were occasioned by some fault or neglect on the part of the assured or that they are chargeable to it by law according to the purport of the provision of the policy above set forth. There is no question about the fact that the cornice, because of its own defects, fell into the public street on a quiet evening, when it is

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said the current of air did not exceed three miles per hour. It is conceded, too, that all of the parties to whom the payments were made received injuries from the fall of the cornice, without fault on their part, while passing the way. Ordinarily, the presumption of negligence which attends such a state of facts would alone suffice, in that the rule *res ipsa loquitur* applies (see McNulty v. Ludwig, 125 App. Div. (N. Y.) 291, 292); for, as said by the court in Mullen v. St. John, 57 N. Y. 567, 571, it is similar to the case of a ship thought to be seaworthy which goes to the bottom in a tranquil sea and without a collision. The mind, in such circumstances, necessarily seeks for a cause of the occurrence. Apparently it is the defective condition of the structure. This, of course, leads to the inference of neglect of duty, which suffices as a prima-facie showing and casts the burden to rebut it on defendant.

But the presumption is to be put aside here, for that, to cast liability at law upon the owner of the property, there must be some showing that the building was defective at the time possession was given over to the tenants under the leases, and it appears the leases were made about three years before. It appears that the cornice which fell was placed on this old building about twenty-five years before the occurrence. It was constructed by means of placing two-by-four pine timbers in the brickwork of the walls above the roof, and these were covered with a metal sheet. The whole was made fast by means of certain iron braces. In the course of all these years, the elements had caused this metal sheeting, which constituted the outside and covering of the cornice to disintegrate, and thus permitted the rain and snow to reach the wooden supports and iron braces within. The two-by-four pine pieces had decayed and the iron bolts rusted, until they broke. The mortar between the brickwork, to which the whole was affixed, had, through thus being exposed to the elements, lost its bond, until it had disintegrated into a mere sandy substance without resisting power. Expert evidence, given by experienced builders and men engaged in the business of wrecking buildings, tended to prove that this

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condition was of long standing, and it sufficiently appears that it was discoverable by ordinary care for a period of several years before—at least antedating the leases in question. This evidence is abundant, as tending to prove that this old, dilapidated and weatherworn cornice, thus overhanging a sidewalk on a public street, was a nuisance, for injuries from which the owner of the property was liable, even at the time the property was let to the tenants. The finding to the effect that the injuries received by the pedestrians in the street were caused by some fault or neglect on the part of the insured and that they were properly chargeable to it by law is amply supported by the evidence. The question concerning this matter was sufficiently submitted to the jury by plaintiff's instruction No. 3 and defendant's instruction No. 7.

But it is argued plaintiff DeMun Estate Corporation, the insured under the policy as it now stands, is in no view liable at law to the persons injured in the street by the falling of the cornice, for that the property was under lease at the time it acquired it. The leases were made by the DeMun heirs through Julius S. Walsh, agent, one in 1907 and the other in 1908, and plaintiff DeMun Estate Corporation came into being subsequent thereto—that is, late in the year 1909. This argument proceeds in the view that, though the evidence sufficiently shows fault and neglect on the part of the DeMun heirs, even prior to the date of the leases, such fault and neglect may not be attributed to plaintiff DeMun Estate Corporation, which, it is said, succeeded to the property subject to the leases. We put aside entirely the argument, that he who knowingly continues a nuisance is responsible, as well as his predecessor, for permitting it in the first instance, as of doubtful import here, because, in no view, may liability be cast secondarily against defendant insurance company, unless the cornice was defective at the time the leases were executed and the property passed into the hands of the tenants, for that the owner of the property is not to be held for a dereliction of duty thereafter. Be this as it may, however, it is abundantly clear that plaintiff DeMun Estate Corpora-

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tion is, both in spirit and substance, a mere continuation of the prior owner—that is, the several heirs of the DeMun estate. The property was owned by the heirs of Isabel DeMun and the leases were made by them through their agent, Julius S. Walsh, for himself and the other owners. In the latter part of the year 1909 the estate was incorporated and the property turned over to it as capital, while shares of stock were issued to each heir representing his proportionate part of the property. One of the heirs was president, another secretary and treasurer, etc., of the corporation, and it amounts to no more than encasing the estate in a corporate charter, for, as said before, in both spirit and substance the assured and lessor remained the same. In other words, the name of the assured and owner was merely changed and, indeed, such is recognized as the fact by defendant in the indorsement on the policy to that effect. By the express words of this indorsement it is recited of date January 28, 1910 that "the name of the assured in this policy is changed to read DeMun Estate Corporation." Obviously, though a corporate charter was obtained, and as incident thereto a franchise for the property interests of the several heirs to continue and subsist as a corporate entity rather than as individual private rights, the interests of the heirs remained the same throughout, in that the DeMun Estate Corporation represented the same rights of property as did the lessors, the heirs of the DeMun estate at the time the leases were executed. It is a benign precept that the common law heeds the substance rather than the mere shadow of things. In such circumstances, the plainest principles of natural justice require that the corporation be regarded as a mere change of name of the owner. In other words, as is well said in the brief, it is similar to the case of an owner going into court after the lease is executed and before the loss and having his name changed by decree, or a *femme sole* owner and lessor taking a different name as the name of her husband through marriage. In either event the owner, lessor and assured remain the same person. The principle declared in Winkleman v. Des

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Moines & Mississippi Levee Dist., 171 Mo. App. 49, 153 S. W. 539, and more recently vindicated in Wilson v. Drainage District, 257 Mo. 266, 165 S. W. 734, s. c. 176 Mo. App. 470, 158 S. W. 931, is reflected and finds appropriate application here.

We see nothing further in the case that merits discussion in the opinion. All of the arguments advanced for a reversal of the judgment have been duly considered but we regard them as insubstantial.

The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

STATE ex rel. ANNA ESTELLE SCANLAND, Relator, v. J. E. THOMPSON, JUDGE, Respondent.

St. Louis Court of Appeals, July 31, 1916.

1. **EXECUTORS AND ADMINISTRATORS: Right to Administer: Rights of Surviving Spouse.** The surviving spouse is given an unqualified right to administer upon the estate of the deceased spouse, in the first instance, by Sec. 15, R. S. 1909, unless disqualified by Sec. 14, although, under Sec. 50, the letters may be revoked after a hearing, if ground therefore exists.

2. ———: ———: ———. In view of the fact that, under section 15, R. S. 1909, a widow who is not disqualified by section 14 has the absolute right to administer upon her deceased husband's estate, the fact that she was improvident, wasteful and extravagant, had no proper appreciation of the value of money, was a woman of immoral character, whose reputation for morality was bad, was deficient in integrity and business honor, was incapable of managing the estate advantageously or properly, and was hostile to the heirs and distributees, was not sufficient to defeat her right, in the first instance, to letters of administration; distinguishing State ex rel. v. Reddish, 148 Mo. App. 715.

3. ———: ———: **Renunciation: Antenuptial Contracts.** The right to administer upon an estate may be renounced, and such renouncement may be effected by an antenuptial contract executed in consideration of marriage.

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4. **MANDAMUS: Executors and Administrators: Renunciation of Right to Administer: Discretionary Determination.** The probate court acts judicially in determining whether or not the right to administer upon an estate has been renounced by one of those entitled to priority, and, in the absence of an abuse of discretion, its action may not be reviewed or interfered with by mandamus; but the probate court is not permitted to act arbitrarily or abuse such discretion, and it cannot conclude the matter by a finding which is wholly unsupported by the evidence.

5. ———: ———: ———: ———. Where, in such a case, the return to an alternative writ of mandamus shows that the respondent judge found that the right to administer had been waived or renounced, and also sets forth all the facts concerning that matter, so that it affirmatively appears that the question turns entirely on a conclusion of law, the immunity from review by mandamus, which usually attends the exercise of a judicial function, does not necessarily obtain.

6. **WAIVER: Elements.** Waiver is purely a matter of intention, and such intention may only be found from facts tending to prove it.

7. **EXECUTORS AND ADMINISTRATORS: Right to Administer: Renunciation of Waiver: Antenuptial Contracts.** A marriage contract between decedent and his widow, which awarded her five thousand dollars at the time of the marriage, and two thousand dollars per year so long as she continued his wife, and thereafter "barred her from his property," did not constitute a renunciation or waiver of the widow's right to administer upon decedent's estate, since the intention to renounce, which is essential to constitute a waiver, was lacking, and there was no renunciation, as the statutory right of a widow to administer upon her deceased husband's estate is not essentially a marital right in his property, but is rather the right to perform an office, through which, after paying the debts and other charges, the estate, less commissions, is eventually turned over to the distributees.

MANDAMUS. ORIGINAL PROCEEDING.

PEREMPTORY WRIT AWARDED.

E. L. Carwine, R. H. Norton and *D. A. Ball* for relator.

(1) If the applicant for letters of administration on the estate of Charles B. Scanland was and is deficient and guilty of all the charges made against her by objectors, still such facts would not give the probate court, or the judge in vacation, any legal reason or legal right

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to refuse applicant letters of administration, for the reason that the statute law of Missouri gives to the widow the absolute right to administer her deceased husband's estate. The probate court has no discretion in the matter. It is an absolute right given her under the law. Mullanphy v. St. Louis County Court, 6 Mo. 563; Shelly v. Veerkamp, 30 Mo. App. 49, 52-3; Hollingsworth v. Jefferies, 121 Mo. App. 660; 1 American Law of Administration, sec. 242; State ex rel., Graves v. Fowler, 108 Mo. 465, 470; State v. Collier, 62 Mo. App. 38; State v. Mitchell, 113 Mo. App. 399. (2) That a wife has been unfaithful and violated her marital obligation does not disqualify her to act as administratrix of her husband's estate. In re Newman's Estate, 124 Cal. 688. (3) The courts have no power to declare a person incompetent to act as administrator unless he is in one of of the classes declared to be incompetent by Probate Code. McClelland Estate, 27 S. Dak. 109; 28 American and English Annotated Cases, 1913C, page 1029, Decided in 1911.

Jones & Haden, Hostetter & Haley, Pearson & Pearson and *W. C. Hughes* for respondent.

(1) The authorities hold that sections 15 and 50, R. S. 1909 (causes for which letters may be revoked) should be construed together; that the probate court, should determine in the first instance, whether or not applicant is such a person that could be immediately removed, if appointed, and if so, he or she should not be granted letters of administration. In so determining the probate court acts judicially. State ex rel. v. Reddish, 148 Mo. App. 715; In re Estate of Evans, 117 Mo. App. 629, 635; State ex rel. v. Guinotte, 113 Mo. App. 399, 408; Stevens v. Larwill, 110 Mo. App. 140, 159. (2) If the probate court acted judicially, in denying relator's application for letters of administration on her deceased husband's estate, its act cannot be reviewed by proceedings on mandamus. State ex rel. v. Guinotte, 113 Mo. App. 399, 405; State ex rel. v. Allen, 92 Mo. 20, 24.

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NORTONI, J.—This is a proceeding in mandamus originating here. The writ is directed against the Probate Court of Pike County in aid of the application of a widow to be appointed administratrix of her deceased husband's estate. Relator is the widow of Charles B. Scanland, who departed this life intestate, in Pike county on May 31, 1916, leaving a personal estate, it is said, of between $60,000 and $75,000. On the application of the widow, Anna Estelle Scanland, to the probate court for letters of administration on her deceased husband's estate, certain collateral heirs of Scanland objected, and the court set the matter down for a hearing. Judgment is invoked by motion on the return.

It appears from the return of the respondent, the judge of the probate court, that the court heard evidence upon the objections and denied the application of relator, in the view that the evidence revealed her to be grossly improvident, wasteful, and extravagant and that she had no proper appreciation of the value of money; that she is a woman of immoral character and her reputation for morality and chastity is bad; that she is deficient in integrity and business honor; and that, because of these facts, she is incapable of managing advantageously so large an estate and also that she is hostile to the heirs and distributees, and it is said her appointment would subject the estate to unusual hazard. Moreover, the court found and declared that prior to relator's marriage to decedent she had entered into a marriage contract with him whereby she relinquished all her right or interest in the estate of decedent. After reciting these facts in the judgment, the probate court denied relator's right to be appointed administratrix and appointed instead the public administrator of Pike county.

It is clear that none of the matters so found and declared by the court in its judgment and set up in the return are sufficient to preclude relator's right to be appointed administratrix of the estate of her deceased husband. The statute relating to the matter (section 14, R. S. 1909) is as follows:

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"*Persons disqualified from administering.*—No judge or clerk of any probate court, in his own county, or his deputy, and no male person under twenty-one years of age, or female person under eighteen years of age, or of unsound mind, shall be executor or administrator. No married woman shall be executrix or administratrix, nor shall the executor of an executor, in consequence thereof, be executor of the first testator."

This section inhibits the appointment of persons therein named and it is conceded that relator is qualified to perform the office of administratrix on her husband's estate in so far as this statute is concerned, that is, she in no wise falls within any of its terms. She is the widow of the decedent and a woman of about thirty years of age. She is unmarried and of sound mind. She is neither the judge nor clerk of the probate court of the county, nor is she deputy clerk, and so far as this statute is concerned she is free to be appointed and to enjoy the valuable right incident to the office of administratrix of her husband's estate. Section 15, Revised Statutes 1909, affords an arbitrary rule on the subject, which it was within the power of the Legislature to prescribe. Therefore, unless some statutory grounds to the contrary appear, it is the duty of the court to confer the appointment upon the person whom the Legislature has nominated to have it as of right. The statute is as follows:

"*Persons entitled to priority in administering.*—Letters of administration shall be granted: First, to the husband or wife; secondly, to those who are entitled to distribution of the estate, or one or more of them, as the court or judge or clerk in vacation shall believe will best manage and preserve the estate." [Section 15, R. S. 1909.]

The right to administer on an estate is a valuable one which should not be denied to the person entitled to priority unless sound reason therefor appears. Grounds for denying the right to either the husband or wife of the deceased are set forth in the statute (section 14, supra) unless a renouncement of it appears. Indeed,

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touching this the Supreme Court has said the law fixes the order of priority and the court can be compelled to follow it by writ of mandamus. [See State ex rel. Grover v. Fowler, 108 Mo. 465, 470, 18 S. W. 968; also Flick v. Schenk, 212 Mo. 275, 279, 110 S. W. 1074.] A sound reason in addition to the mandate of the statute itself for appointing the person whom the Legislature has nominated to the office is that no appeal is allowed as a means of review in such matters, and it therefore may be that a valuable right is denied without proper recourse to the injured party. [See authorities supra.] In view of this it would seem to be just that the appointment should be made in the first instance, and then, if grounds for removal exists, they should be invoked under section 50 and a full hearing had, so the usual right of appeal and review may be enjoyed.

But it is argued that section 50, Revised Statutes 1909, which provides the causes for which letters of administration may be revoked is to be considered *in pari materia* with sections 14 and 15 and the whole matter adjudicated on the application for letters in the first instance. It is true this court so declared in State ex rel. v. Reddish, 148 Mo. App. 715, 129 S. W. 53, but that case in no wise involves the right of the husband or wife of the deceased to administer on his or her estate. Rather the question arose under the second subdivision of section 15, supra, for that there the son of the decedent sought to be appointed administrator of his father's estate and it appeared that three of his brothers and sisters objected, though they renounced their own right. The adjudication was against the right of the son so applying, on the grounds that he was administrator of his mother's estate and a conflict of interest because of this appeared. It is to be observed, however, that the second subdivision of the statute (section 15, supra) essentially confers a discretion on the probate court as to whom, among the distributees of the estate, shall be appointed. The statute reads that the letters shall be granted secondly "to those who are entitled to distribution of the estate, or one or more of them, as the

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court or judge or clerk in vacation shall believe will best manage and preserve the estate." In considering this provision of the statute which by its very terms appears to confer a discretion on the probate court, for that it says the appointment shall be conferred upon the distributee or distributees that the court "shall believe will best manage and preserve the estate," it was declared in State ex rel. v. Reddish, supra, that the court may consider *in pari materia* with sections 14 and 15 section 50, setting forth causes for which an administrator may be removed. But under this second subdivision of the statute, as stated, there is a discretion lodged in the probate court touching the matter of the appointment, that is, in making the selection of an administrator from among the distributees. And where such discretion is to be exercised, it is well enough to take into account the grounds for removal set out in section 50.

But it is certain that the doctrine referred to may not be extended in view of the recent decision of the Supreme Court in State ex rel. Abercrombie v. Holtcamp, 257 Mo. 412, 185 S. W. 201, for there the court rejects the argument that section 50 is to be interpreted and read in connection with section 14. The facts that relator is improvident, wasteful, and extravagant and has no proper appreciation of the value of money; that she is a woman of immoral character and her reputation for morality bad; that she is deficient in integrity and business honor; that she is incapable of managing advantageously or properly so large an estate, and that she is hostile to the heirs and distributees, are not sufficient to defeat her right in the first instance to be appointed administratrix of her husband's estate in accordance with the statute, for the statute says she shall be appointed if she is the widow and a woman of sound mind not otherwise disqualified by section 14. After she is once appointed, maybe it would be competent for the court to remove her under the provisions of section 50, but that question would be open to consideration on appeal, whereas no appeal is afforded to the applicant for letters in the first instance. In this connection see the reasoning

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in State ex rel. Abercrombie v. Holtcamp, 257 Mo. 412, 185 S. W. 201.

But it is argued that the probate court found as a fact that relator had entered into an antenuptial contract in consideration of marriage with her husband whereby she relinquished all right or interest in the estate of decedent and this will suffice to defeat her right to have letters of administration thereon issued to her. No one can doubt that one entitled to administer upon an estate may renounce this right, for the statute so provides. It is true too that one may renounce this right by an antenuptial contract executed in consideration of marriage, as this court declared in Evans v. McDaniel, 117 Mo. App. 629, 93 S. W. 922. In that case Evans bound himself by the marriage contract not to "control or claim" any of the property of his wife during her lifetime or after her death and the court declared that this amounted to a renunciation of his right to administer on her estate, for that the right to control her property in any wise after her death was renounced, as well the right to administer thereon.

It may be conceded that the probate court acts judicially in determining whether or not the right to administer an estate has been renounced by one of those entitled to priority and in the absence of an abuse of discretion in respect of that matter such discretion may not be reviewed or interfered with by mandamus. In other words, though a discretion be lodged in the court in determining that particular matter, it is not permitted to act arbitrarily or abuse such discretion nor conclude the matter by a finding which is wholly unsupported by the evidence, as is said in State ex rel. Abercrombie v. Holtcamp, 257 Mo. 412, 185 S. W. 201. When, therefore, it appears from the return in mandamus, as here, that the court found the right to administer was waived or renounced and sets forth all the facts concerning that matter so it affirmatively appears that the question turns entirely on a conclusion of law, the immunity from review by mandamus which usually attends the exercise of a judicial function does not necessarily obtain. Here it

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appears from the return that the court found the marriage contract between decedent and relator merely awarded to the wife $5000 at the time of the marriage and $2000 per year as long as she continued his wife and thereafter "barred her from his property." Obviously this reveals no intention on her part to renounce her right as the widow to administer upon his estate. It is certain no express relinquishment appears and a waiver is purely a matter of intention. Such intention may only be found from facts tending to prove it. [See Francis v. Supreme Lodge A. O. U. W., 150 Mo. App. 347, 130 S. W. 500.] Therefore, though relator received $5000 at marriage and $2000 per year thereafter and her marital rights in the husband's property were barred after his death, this in no wise included the statutory right of the widow to administer upon the estate, for such is not essentially a marital right in his property but is rather the right to perform an office through which, after paying the debts and other proper charges, the estate is eventually turned, less commissions, over to the distributees on final settlement.

We see nothing in the return which precludes the right of relator to be appointed administratrix of her husband's estate, and the preliminary writ of mandamus should therefore, notwithstanding such return, be made absolute with a direction as well to the Probate Court of Pike County to vacate its order appointing the public administrator as administrator of the estate of Charles B. Scanland and appoint relator instead. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1916.

MATT G. REYNOLDS, RECEIVER, Respondent, v. TITLE GUARANTY TRUST COMPANY, Appellant.

St. Louis Court of Appeals, October 24, 1916.

1. **CORPORATIONS: Officers: Payment of Private Debt with Corporate Funds: Liability of Recipient.** Where a check of a corporation, drawn by an officer thereof, is by him tendered to his creditor in payment of his individual debt, the fact that the instrument upon its face purports to be drawn upon corporate funds under the officer's control is sufficient to put the creditor upon inquiry, and if such a check is accepted and used by the creditor, he runs the risk of being required to restore to the corporation the proceeds thereof; but this doctrine finds application only where the check is drawn upon funds actually belonging to the corporation and which the officer could not rightfully draw upon, whereby such funds are misappropriated.

2. **APPELLATE PRACTICE: Conclusiveness of Finding.** A finding by the trial court, sitting as a jury, upon any controverted question of fact is conclusive upon the appellate court, if supported by any substantial evidence.

3. ———: ———. While it is not the province of the appellate court to pass upon the credibility of witnesses or the weight to be given their testimony, nevertheless where testimony cannot possibly be true, a finding by the trial court, predicated thereon, is not binding upon the appellate court.

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4. ———: ———. In an action for money had and received, brought by the receiver of an insurance company which had never become fully organized nor obtained authority to transact business conformably to the insurance statute, a finding by the trial court that a loan obtained by the promoter of the company was made to the company, predicated upon evidence to that effect, was not binding upon the appellate court, for the reason that, such company never having become fully organized nor authorized to transact business, the evidence upon which the finding was based could not possibly be true.

5. **CORPORATIONS: Promoters: Right to Act for Corporation Not In Esse.** A promoter of a corporation may not act as agent for it before it has corporate existence, since one cannot be the agent of a principal not *in esse*.

6. **INSURANCE: Insurance Companies: Organization: Existence: Statute.** Under Sec. 6900, R. S. 1909, providing that, whenever the corporators of an insurance company shall have filed with the superintendent of the insurance department the declaration of intention to form a corporation required by Sec. 6898, together with the proof of publication required by that section, such superintendent shall submit the declaration to the Attorney General, who, if he finds it in accordance with the law, shall so certify to the superintendent, who shall record the papers with the certificate, furnish a certified copy thereof to the corporators, and file a certified copy with the Secretary of State, who, on payment of the tax required by Sec. 2976, shall issue a certificate of incorporation authorizing the company to open books for subscriptions to its capital stock, and further providing that it shall be unlawful for the company to transact any business until it has fully complied with the article and Secs. 6901, 6902, providing for the steps to be taken, after the capital stock has been subscribed, to procure authority to transact business, the issuance to the corporators of the certificate of incorporation does not give existence to the corporation, but it remains *in utero* until the capital stock is fully subscribed and authority to transact business is obtained in the manner provided by the statute; the "certificate of incorporation" merely having the effect of granting to the "corporators" the power to open books of subscription and take subscriptions to the capital stock of the proposed corporation.

7. **CORPORATIONS: Insurance Companies: Payment of Promoter's Debt with Supposed Funds of Corporation: Corporation not In Esse: Liability of Recipient.** The promoter of an insurance company deposited in a bank, in the name of the proposed corporation, funds individually procured by him by means of a loan. A certificate of incorporation was issued to the proposed company, pursuant to Sec. 6900, R. S. 1909, but the capital stock was not fully secured nor authority to transact business obtained, in the manner provided by Secs. 6901, 6902. The promoter paid his individual debt by means of

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a check drawn upon these funds, and the receiver of the company brought suit against the recipient of the check, on the theory that it was liable by reason of having accepted and used a check drawn upon corporate funds, in payment of the promoter's individual debt. *Held*, that the fact that the funds upon which check was drawn were held in the name of a company proposed to be incorporated and of which the promoter styled himself secretary, did not have the effect of constituting the funds corporate funds, and, by reason of the fact that the proposed corporation had never been authorized to transact business as an insurance company, it had no legal existence, and could not ratify or adopt the transaction so as to affect the character of the funds or become liable for the repayment of the loan by which they were obtained, and hence the receiver was not entitled to recover.

8. ———: **Promoters: Fiduciary Relations.** The promoters of a corporation stand in a fiduciary relation to it, but it does not follow that all moneys belonging to or procured by a promoter which may be handled or dealt with by him during the promotion are impressed with a trust in favor of the corporation.

Appeal from St. Louis City Circuit Court.—*Hon. Rhodes E. Cave*, Judge.

REVERSED.

Wilfley, McIntyre & Nardin and *Harry W. Allen* for appellant.

(1) The action for money had and received is equitable in character; is governed by principles of equity, and lies where one person has received money belonging to another which in justice and good conscience he should not be permitted to retain. Third National Bank v. St. Charles Sav. Bank, 244 Mo. 581; Reynolds v. Gerdelman, 185 Mo. App. 183. (2) A promoter is not an agent of the corporation to be formed, and the corporation is not liable for contracts entered into by promoters. Joy v. Manion, 28 Mo. App. 60; Davis & Rankin v. Creamery Association, 63 Mo. App. 480. (3) The promoters or incorporators of an insurance company, even after the certificate of incorporation is issued, have no power to enter into any contract except that of a stock subscription and have no power to ratify or adopt any contract for the expenditure of any proceeds of the sale of stock,

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or pay any expense incurred by a promoter in organizing the company. Taylor v. St. Louis National Life Insurance Company, 266 Mo. 283. (4) The promoter of a corporation is in a fiduciary relation to the corporation, in that he may not dispose of property to the corporation at a secret profit to himself; is a trustee, prior to the completion of the company, for the subscribers of money received from them on stock subscriptions, but is not a general trustee for the proposed corporation. South Joplin Land Co. v. Case, 104 Mo. 572; Miller v. Denman (Wash.), 95 Pac. 67, 16 L. R. A. (N. S.) 348; Brooker v. Trust Company, 254 Mo. 155. (5) Gardner not being the agent for the Assurance Company at the time the loan was made by Caneer, even though a trustee for the Assurance Company, could not bind the company to repay the loan, though it was made in the name of the company, for a trustee making a loan in the name of the trust estate binds only himself. Koken Iron Works v. Kinealy, 86 Mo. App. 203; Taylor v. Davis, 110 U. S. 335. (6) An implied trust arising out of circumstances from which an intention to hold money or property for the benefit of another is presumed, is a resulting trust. Perry on Trusts (5 Ed.), sec. 127. (7) A resulting trust must arise from circumstances existing at the time the person sought to be charged as trustee took the property sought to be impressed with the trust, and cannot be established by subsequent acts or circumstances. Richardson v. Champion, 143 Mo. 544; Stevenson v. Haynes, 220 Mo. 206; Barrett v. Foote, 187 S. W. 67; Krauth v. Thiele, 45 N. J. Equity 409; Whitley v. Ogle, 47 N. J. Equity 69; Barnard v. Jewett, 97 Mass. 87; Dick v. Dick, 172 Ill. 578; DeRoboam v. Schmidtlin, 50 Ore. 388; Herlihy v. Coney, 99 Me. 469; Parker v. Coop, 60 Tex. 118; Arnold, Receiver, v. Ellis, 20 Tex. Civ. App. 262; Hadley v. Stewart, 62 Ia. 267. (8) The contract of Gardner to borrow money from Caneer for the Assurance Company could not be ratified by the company after it was organized, thus relating back to the date of the loan and making the proceeds the property of the company when the loan was made, for

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there can be ratification only where the person ratifying was in existence at the time the contract was made. 31 Cyc. 1246; McArthur v. Times Printing Co., 48 Minn. 319. (9) If the Assurance Company adopted the contract between Gardner and Caneer, it made it its contract at the time of its adoption, subject to all the burdens and conditions attached to it. Watson v. Bigelow, 47 Mo. 413; Shinn v. Mule Co., 109 Mo. App. 557; Porter v. Wood, 138 Mo. 539; State ex rel. v. Harrington, 100 Mo. 170; Nichols v. Kern, 32 Mo. App. 1. (10) When the receiver brought suit against Gardner to recover from him the money paid to the Title Guaranty Trust Company, he elected to treat Gardner as a debtor and chose a course inconsistent with the present action. Oliver v. Piatt, 15 U. S. 485; Stoller v. Coates, 88 Mo. 514; Barker v. Barker, 14 Wis. 131; Carter v. Gibson, 61 Neb. 207; Libby v. Frost, 98 Me. 288; Murray & Winter v. Ballou & Hunt, 1 Johnson's Chancery 565; Murray v. Tilburn, 2 Johnson's Ch. 441. (11) There was no evidence to support the finding of the trial court that defendant had notice that the money it received belonged to the Continental Assurance Company. Coleman v. Stocke, 159 Mo. App. 43.

John S. Leahy and *Chase Morsey* for respondent.

(1) The Title Guaranty Trust Company, having accepted a check of the Continental Assurance Company of America in payment of a private debt of Harry B. Gardner, the officer drawing the check, took the money with knowledge of the fact that it was not Harry B. Gardner's and in this action for money had and received must account for its proceeds. St. Louis Charcoal Co. v. Lewis, 154 Mo. App. 548; Coleman v. Stocke, 159 Mo. App. 43; Rochester v. Pavior, 164 N. Y. 281; Bank v. Edwards, 243 Mo. 569; Bank v. Orthwein, 160 Mo. App. 369. (2) One who has notice sufficient to put him upon inquiry is bound by every fact which an inquiry would have disclosed. Lakeman v. Trust Co., 147 Mo. App. 48; Barrett v. Davis, 104 Mo. 549; Rupe v. Alkire, 77 Mo. 641. (3) While the Continental Assurance Company of

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American may not, strictly speaking, have been liable on the contract by which the money was borrowed from the Citizens' Bank of Senath, Missouri, still it was liable under the broad equitable principles of an action for money had and received. Third National Bk. v. St. Charles Savings Bk., 244 Mo. 554. (4) At the time of the transaction in question, the Continental Assurance Company of America was in process of formation. The initial steps, such as signing the articles of association and publication of the declaration of intention to form the corporation, had been taken and all persons dealing with the company were bound to take notice of these facts. Ellerby v. Bank, 109 Mo. 445. (5) Where a statute requires a number of steps to be taken before the company is entitled to a certificate of incorporation and further requires the public to be notified of these steps, as in the case at bar, the taking of the final step and the securing of the certificate of incorporation relates back to the time of the taking of the first step and all the rights, duties and liabilities of the corporation are determined as of the date of the first step whenever it is necessary to prevent a failure of justice. Knapp v. Alexander, 237 U. S. 162; Peyton v. Desmond, 129 Fed. 1; U. S. v. Anderson, 194 U. S. 394. (6) By the doctrine of relation is meant that principle by which an act done at one time is considered by a fiction of law to have been done at some antecedent period. It is usually applied where several proceedings are essential to complete a particular transaction, such as a conveyance or deed. The last proceeding which consummates the conveyance is held for certain purposes to take effect by relation as of the date the first proceeding was had. Gibson v. Chouteau, 13 Wall. 92; Knapp v. Alexander, 237 U. S. 162; Peyton v. Desmond, 129 Fed. 1; U. S. v. Anderson, 194 U. S. 394. (7) To obtain the certificate of incorporation it was necessary to pay the fees of the Secretary of State and the fees for publishing the declaration of intention. Someone was bound to pay these fees. Mr. Gardner and his associates primarily—the corporation ultimately. For all business transacted for the bene-

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fit of the corporators during these preliminary steps the corporators were liable as partners. The money was borrowed in the name of the company to cover the initial expenses of incorporation. Mr. Gardner misappropriated $5445.18 of the amount borrowed, and if the company had never received its certificate of incorporation the corporators—the partnership—could have recovered the money from the Trust Company in an action for money had and received. The company, however, having received its certificate of incorporation and having repaid the loan, now has the same right to maintain the action as the corporators—the partnership. (8) By instituting a suit against Gardner to recover the amount of money unlawfully withdrawn by him from the Third National Bank, the Receiver made no election of remedies because all of his remedies in this case are consistent. Steinbach v. Murphy, 143 Mo. App. 530; National Bank v. City Bank, 103 U. S. 668; Sweet v. Bank, 69 Kan. 741; State v. Home Ins. Co., 58 Neb. 524; Freeman v. Bailey, 50 S. C. 241; Squire v. Ordemann, 194 N. Y. 394; Citizens' Bank v. Rucker, 138 Cal. 606. (9) The doctrine of resulting trust has no application to the facts in the case at bar. The Receiver is not trying to impress a trust upon the real estate. He is seeking to recover from the Trust Company on the theory of money had and received, or, in other words, on the theory of a constructive trust. The difference between resulting and constructive trusts is marked and well defined. 39 Cyc., page 26 et seq.

ALLEN, J.—This is an action prosecuted by the receiver of the Continental Assurance Company of America as for money had and received. The first count of the petition is predicated upon the theory that the defendant is liable for the return of the proceeds of a check for the sum of $5445.18, executed in the name of the Continental Assurance Company of America, and which is said to have been received by the defendant Trust Company in payment of a private debt of one Harry B. Gardner, a promoter of the Assurance Com-

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pany. The second count of the petition is predicated upon a like theory, involving the proceeds of a check for $250. The trial, before the court without the intervention of a jury, resulted in a judgment for plaintiff on the first count of the petition, and a judgment for defendant on the second count thereof, and the case is here on defendant's appeal.

The evidence discloses that prior to March, 1909, one Harry B. Gardner borrowed certain moneys from the defendant Trust Company, giving the latter as security therefor a second deed of trust upon his home in the city of St. Louis. He was unable to pay this debt at maturity, and the defendant Trust Company caused the property to be sold under the deed of trust held by it, and purchased the same at the trustee's sale subject to a first deed of trust thereon of $10,000. It was thereafter agreed, however, between defendant and Gardner, that the latter might redeem the property by fully reimbursing defendant, the amount to be so paid amounting in all to $6445.18; and Gardner paid defendant $1000, leaving a balance of $5445.18 due the Trust Company at the time of the transactions with which we are here concerned.

Early in 1909 Gardner was engaged in promoting the organization of an insurance company under the law of this State, to-wit, sections 6895 et seq., Revised Statutes 1909; and in furtherance of this design he and certain other persons whom he had associated with him caused to be published in a newspaper in the city of St. Louis a declaration of their intention to incorporate an insurance company to be known as the Continental Assurance Company of America, publishing therewith a copy of the proposed charter of the company sought to be organized. This publication first appeared on February 17, 1909, and was repeated on February 24, March 3 and March 10, of the same year. However, a defect, or supposed defect, was discovered in the matter so published, and the same was amended and republished for four consecutive weeks beginning March 27 and ending April 17, 1909. Thereafter the declaration and the copy

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of the proposed charter so published were filed in the office of the superintendent of the insurance department of the State; and thereafter, to-wit, on April 24, 1909, a certificate of incorporation was issued to the company, as provided by section 6900, Revised Statutes 1909. It appears that thereafter a large number of subscriptions were procured to the capital stock of the company, but that all of its capital stock was never fully subscribed; and it consequently never obtained a certificate of authority to transact business under section 6902, Revised Statutes 1909. Its career was terminated by plaintiff's appointment as receiver on June 10, 1910.

Prior to the issuance of the certificate of incorporation of April 24, 1909, above referred to, to-wit, on February 29, 1909, Gardner opened a bank account with the Third National Bank of St. Louis, in the name of the proposed company, viz: "Continental Assurance Company of America," which account he made use of in promoting the proposed company. On March 26, 1909, nearly one month prior to the issuance of the certificate of incorporation above mentioned, Gardner drew a check upon this account, executed in the name of the Continental Assurance Company of America, "by Harry B. Gardner, Secretary," payable to the defendant Trust Company, for the sum of $5445.18, and caused it to be tendered to defendant in payment of said amount necessary to redeem his property. The evidence is that defendant refused to accept this check, and notified Gardner that it would accept only cash or a cashier's check. It appears, however, that the endorsement of defendant was placed upon the check by one of its officers. It was subsequently presented to the Third National Bank and was utilized to procure a cashier's check for a like amount, payable to the defendant, which check the defendant accepted. Defendant thereupon deeded the property, i. e., Gardner's home, to one W. H. Douglas, subject to the first mortgage thereon, in conformity to an understanding and agreement had between the parties in the premises. The connection of Douglas with the matter will more fully appear from the evidence

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presently to be stated respecting the source from which the money used to redeem the Gardner property was derived.

It appears that on March 23, 1909 (more than one month prior to the issuance of the certificate of incorporation to the Assurance Company), as the result of a loan of $6250 procured by Gardner from the Citizens Bank of Senath, Missouri, or from one A. A. Caneer, its cashier, the account which Gardner had opened in the Third National Bank in the name of the Continental Assurance Company of America, was credited with the sum of $6243.75, being the proceeds of a draft, less exchange. It appears that a draft for $6250 was drawn in the name of the Continental Assurance Company by Gardner, as secretary, upon the Citizens Bank of Senath, which was subsequently honored by the latter bank. It further appears that prior to this time there had been deposited in this account, in the Third National Bank, but the sum of $2125, and that $1625 had been checked out; leaving a balance in the account of $500. After the deposit of the $6243.75 above mentioned, to-wit, on March 26, 1909, Gardner's indebtedness to defendant was paid from this account, in the manner above stated.

Douglas, who had formerly been president of the Citizens Bank of Senath, had, shortly prior to the time of the transactions here in question, become connected with the promotion of the Assurance Company. He testified that after the sale of the Gardner house under foreclosure, Gardner, or one Gillespie for Gardner, asked him to assist in borrowing the money necessary to redeem the property, and that in pursuance of such request he undertook to procure a loan for such purpose from the Citizens Bank of Senath; that he was not then an officer of the bank, but a stockholder, and "looked after some affairs of the bank on request," because his father and brother were directors thereof and his family interested therein; that he took up the matter with Caneer, cashier of the bank, and advised him that the second deed of trust on the Gardner house would be safe security for a loan of $6500; that the loan was thereafter made, and

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he (Douglas) received from Gardner a "check or draft" and redeemed the property, taking title in his own name for the protection of the Citizens Bank of Senath, which he represented; and that after so acquiring title to the property he executed a deed of trust thereon for $6500 and delivered it either to Gardner or Gillespie for the purpose of having it sold and thus procure money to repay the Citizens Bank of Senath; and that after the execution of this second deed of trust he (Douglas) conveyed the property to Gardner subject to the two deeds of trust. He stated that the money in question was borrowed from the Citizens Bank of Senath by Gardner personally, and not by the Assurance Company, "as all transactions up to that time were with Gardner personally;" but that the name "Continental Assurance Company of America" was used for the reason that Gardner was "in bankruptcy" and did not want to transact business in his own name.

Gardner testified that the fund placed to the credit of the account in the name of the Continental Assurance Company in the Third National Bank, to-wit, $6243.75, was the proceeds of a loan secured by him from A. A. Caneer, cashier of the Citizens Bank of Senath; that it was a part of a loan for $10,000 which he (Gardner) had arranged to get from Caneer, the money to be used in promoting the Continental Assurance Company. According to his recollection the deposit so made was a personal check of A. A. Caneer. He testified that he entered into a written contract with A. A. Caneer on March 12, 1910, for the loan to him personally of $10,000. It appears that the original contract had been lost, but the witness identified a copy thereof which was introduced in evidence and which is as follows:

"St. Louis, Mo., March 12, 1909.

"This contract, entered into by and between A. A. Caneer and H. B. Gardner, for and in consideration of a loan of ten thousand dollars ($10,000), to be made to H. B. Gardner by A. A. Caneer, and the services of Caneer in the office and officially, as may seem best for the interest of the Continental Assurance and the Inter-

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national Fire Assurance Companies now being organized in St. Louis, Missouri, the said loan or any part less than $10,000 loaned shall be paid back to said Caneer on or before January 1, 1910; and it is understood that A. A. Caneer shall devote his entire time and assistance toward the organization of the insurance companies up to January 1, 1910, and H. B. Gardner guarantees to pay the said loan as aforesaid and pay to A. A. Caneer the sum of ten thousand dollars ($10,000) for his (Caneer's) services to said Gardner and companies.

(Signed) A. A. CANEER.
H. B. GARDNER."

Caneer testified that on or about March 24 or 25, 1909, the Citizens Bank of Senath received from the Third National Bank of St. Louis a draft drawn by Gardner in the name of the Continental Assurance Company of America for $6250; that the Citizens Bank of Senath withheld payment until it communicated with Gardner "who explained that he needed more money to keep the business of promoting the company going" and that if the bank would honor the draft the money would be replaced within a short time from the sale of company stock. And he testified that certain moneys thereafter derived from the sale of stock of the Assurance Company "in the territory where the bank was located," were deposited in the Citizens Bank of Senath, and that such moneys were utilized to reimburse the bank for the loan. On cross-examination he stated that the loan in question was made to "the Continental and International Insurance Companies;" and that no note or collateral was taken therefor. The testimony of this witness was impeached, however, by the testimony of two members of the firm of attorneys representing the defendant who testified that Caneer, in a telephone communication heard by both of the attorneys, had stated that the loan in question was made to Gardner personally and that it was secured by a note for $6500 executed by Douglas and secured by a second deed of trust on the Gardner house. And the undisputed evidence is that the note and deed of trust, last mentioned, found their way into the hands

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of the Citizens Bank of Senath; but Caneer testified that these were not taken as security for the loan of $6250, but for a subsequent loan of $3500.

Defendant in its answer pleaded that plaintiff had previously prosecuted an action against Gardner, with full knowledge of all the facts and circumstances connected with the transaction here in controversy, and in that action had obtained a final judgment against Gardner for the sum of $135,489.35, which sum included the item of $5445.18 which plaintiff seeks to recover in the first count of the petition herein; and that plaintiff, having thus elected to pursue his remedy against Gardner, was barred from prosecuting the cause of action declared upon in said count. And the evidence disclosed that a judgment had been so obtained by plaintiff against Gardner upon a demand which included the item here in controversy.

The court made a special finding, setting forth its findings of fact and conclusions of law. These need not be set out at length, but in the course of the opinion we shall have occasion to refer to the court's ultimate findings and concluions upon which it predicated its judgment in plaintiff's favor.

I. The general doctrine invoked by plaintiff is one supported by reason and authority. Where a check of a corporation, drawn by an officer thereof, is by him tendered to his creditor in payment of his individual debt, the fact that the instrument upon its face purports to be drawn upon corporate funds under the officer's control is held to suffice to put the creditor upon inquiry; and if a check of such character is accepted and used by the creditor he runs the risk of being required to restore to the corporation the proceeds thereof. [See Charcoal Co. v. Lewis, 154 Mo. App. 548, 136 S. W. 716; Coleman v. Stocke, 159 Mo. App. 43, 139 S. W. 216; Rochester v. Paviour, 169 N. W. 281.] But this doctrine finds application only where the check of a corporation, thus used to pay an officer's private debt, is drawn upon funds actually belonging to the corporation and which the

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officer could not rightfully draw upon, whereby corporate funds are misappropriated. It is not to be supposed that one who receives such a check in the payment of an officer's private debt is liable to answer over to the corporation when in truth corporate funds were not utilized in the transaction, and the corporation thereby suffered no loss. No one will contend that an action for money had and received will lie against the recipient of such a check of a corporation taken for the payment of an officer's private obligation, merely because of the fact alone that the corporation's check was employed in the transaction. On the other hand such use of a check of a corporation is sufficient to put the creditor upon his guard; and he accepts it at his peril. We are to consider whether or not the facts of this case bring it within the doctrine invoked; bearing in mind that the trial court, sitting as a jury, has found the facts in plaintiff's favor, and that its finding on any controverted question of fact is conclusive upon us if supported by any substantial evidence.

II. It is argued for appellant that plaintiff's action declared upon in the first count of the petition is barred by reason of having obtained a judgment against Gardner for a sum which included that item; that, having elected to thus pursue Gardner, plaintiff is now precluded from asserting his said claim against defendant. The trial court took the view that both remedies were available to plaintiff, though but one satisfaction could be had. But we shall dispose of the case on other grounds, assuming, without deciding, that the trial court was correct in this holding.

III. Another question arises because of the state of the evidence relative to what occurred when defendant was paid the sum sought to be recovered. All of the evidence touching the matter shows, and the trial court so found, that the defendant refused to accept the check executed in the name of the Assurance Company and tendered in payment of Gardner's debt, and demanded either cash or a cashier's check; and that thereafter a

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cashier's check was delivered to the defendant, whereupon it conveyed the property to Douglas. But the check drawn in the name of the Assurance Company had (inadvertently or otherwise) been indorsed by defendant, and was used at the bank to procure the cashier's check. There is no positive testimony as to who presented the original check to the bank in order to procure the cashier's check, but the uncontradicted evidence is that the cashier's check was delivered to defendant, either by Gardner himself or by Douglas for him, making it appear that the original check was presented to the bank by Gardner or some one representing him. Plaintiff's case therefore is brought within the doctrine of the cases cited above, if at all, by reason of the fact that defendant's indorsement (unexplained) is found upon the original check which was utilized as above stated. Under the circumstances we are not prepared to say that the mere appearance of this indorsement on the check is sufficient to bring the case within the doctrine relied upon. But in the view which we take of the case it is unnecessary to pass upon this question.

IV. The vital question presented upon the record is whether or not there is any evidence, of probative force and value, that funds of the Continental Assurance Company of America were in fact drawn upon and utilized to pay the private debt of Gardner, who assumed to act as secretary of the proposed corporation. On March 26, 1909, the date of the transaction with defendant Trust Company here in question, the Continental Assurance Company of America, was not in existence. Its promoters were proceeding with the steps leading up to its incorporation, and were then publishing the declaration of intention to form a corporation under the statutes mentioned above. That declaration, together with the proposed charter, had not been filed in the office of the superintendent of insurance, as required by section 6898, supra. Such declaration and proposed charter were thereafter so filed, and on April 24, 1909, a certificate of incorporation was issued by the Secretary of State, in accordance with section 6900, supra. The Assurance

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Company therefore had no existence whatsoever prior to April 24, 1909; the term, "Continental Assurance Company of America," was but a name utilized by Harry B. Gardner for his individual purposes. As early as February 29, 1909, nearly two months before the certificate of incorporation was issued, Gardner opened the bank account in this name, which he used as he saw fit. But three deposits were made in that account prior to the deposit made as a result of the loan from the Citizens Bank of Senath, or Caneer, its cashier, and out of which Gardner's debt to the defendant Trust Company was paid. All of the evidence, excepting the bare statement of the witness Caneer, is to the effect that this loan was made to Gardner personally, and the evidence tends strongly to show that it was upon the security of Gardner's own property, which is said to have been deeded to Douglas to secure the Citizens Bank of Senath, into whose possession the deed of trust executed by Douglas found its way. The testimony of Caneer, to the effect that the loan was made to the Assurance Company, is wholly devoid of probative force and must be rejected as valueless. It is not our province to pass upon the credibility of witnesses or the weight to be given to their testimony; but the testimony that the loan was made to the Assurance Company cannot possibly be true, for that company had no shadow of existence at the time, and in fact never reached the point where it had the corporate power to enter into a transaction of such character.

If the loan was a part of the $10,000 agreed to be loaned by Caneer to Gardner, in accordance with the written contract between them, quoted above, it was nevertheless Gardner's personal affair and not that of the corporation which then had no existence. If it be true that the loan was ostensibly made to furnish Gardner funds with which to carry on the promotion of the company, it was none the less a matter personal to Gardner. The corporation, not being in any sense in existence, could not have been a party to the transaction; neither could Gardner have acted as agent for it, since one cannot be the agent of a principal not *in esse*. There is no

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element of ratification or adoption present. Properly speaking the corporation could only become liable upon the contract by adopting the same as its own (see Furniture & Carpet Co. v. Crawford, 127 Mo. l. c. 364, 365, 30 S. W. 163), but, as we shall readily see, this corporation failed to reach the stage where it was possible for it to bind itself upon any contract or undertaking entered into by its promoters.

Section 6900, Revised Statutes 1909, referred to above, provides that whenever the corporators of an insurance company of the character here in question shall have filed the declaration required by section 6898, supra, together with proof of publication required by the latter section, with the superintendent of the insurance department of the State, it shall be the latter's duty to submit such declaration to the Attorney General for examination, and if it shall be found by him to be in accordance with the provisions of article II, chapter 61, Revised Statutes 1909, and "not inconsistent with the Constitution and Laws of this State and of the United States," he shall so certify and deliver the same back to the superintendent who shall cause the papers, with the certificate of the Attorney General, to be recorded and shall furnish a certified copy thereof to the corporators and file a like certified copy with the Secretary of State who, upon payment into the State treasury of the tax required by section 2976, Revised Statutes 1909, shall issue a certificate of incorporation, "upon the receipt of which they (the corporators) shall become a body politic and corporate and may proceed to organize in the manner set forth in their charter and to open books for subscriptions to the capital stock of the company and keep the same open until the whole amount specified in the charter is subscribed, *but it shall not be lawful for such company to issue policies or transact any business of any kind or nature whatsoever, except as aforesaid, until they have fully complied with the requirements of this article.*" (Italics ours.)

Sections 6901 and 6902 provide steps to be taken after the capital stock named in the charter has been

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fully subscribed, and $100,000 thereof paid in, in order to procure authority to transact business as an insurance company.

Under these statutes the issuance to the corporators of the so-called certificate of incorporation does not give birth to the corporation. It remains *in utero* until the capital stock is fully subscribed and authority to transact business is obtained in the manner provided by the statute. The "certificate of incorporation" merely has the effect of granting to the "corporators" the power to open books of subscription and take subscriptions to the capital stock of the proposed corporation. [See Taylor v. Insurance Co., 266 Mo. 283, 181 S. W. 8.]

It is therefore readily apparent that by no possible means could the "Continental Assurance Company of America" have made itself liable for moneys loaned by Caneer or his bank to Gardner for promotion purposes or otherwise. Even after the issuance of the certificate of incorporation no power resided in the corporators, or the proposed corporation, to transact business of any such character. [See Ellerby v. Bank, 109 Mo. 445, 19 S. W. 241; Taylor v. Insurance Co., supra.] And in no sense were the funds thus obtained by Gardner corporate funds. They did not come from stock subscriptions, but were procured by Gardner for his individual purposes, whatever they may have been, prior to the time when the corporators became clothed with power to take subscriptions to the capital stock.

The trial court, in its findings of fact, in part states:

"The court is of opinion that the testimony of the witnesses can only be harmonized with each other and with the undisputed facts upon the theory that the money was loaned to Gardner, but for the Assurance Company; and I therefore find the fact to be that this loan was made to and became the property of the Assurance Company, and that there were no funds belonging to Gardner individually mingled in the account of the company in the Third National Bank. Nor, in so holding have I overlooked the fact that a second deed of trust on the property, 5000 Raymond avenue, was given as securi-

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ty for the loan. The company may have borrowed the money and Gardner furnished the security, and still it would be a loan to the company."

But the finding that the loan "was made to and became the property of the Assurance Company" has nothing to support it; and we are consequently in no manner bound thereby. And equally untenable is the theory that the loan was made for the Assurance Company and thereby became impressed with a trust in its favor. It is true that promoters stand in a fiduciary relation to the corporation which they bring into being, but it does not follow that all moneys belonging to or procured by a promoter, which may happen to have been handled or dealt with by him during the promotion of the corporation, are impressed with a trust in its favor. The fund here utilized to pay defendant was one procured individually by Gardner, and, as the trial court finds, upon security furnished by him. It never came into the treasury of the corporation, and in truth was not disbursed by an officer thereof. The fact that it was deposited in and temporarily became a part of a bank account which Gardner had opened under a name which he intended to use as the name of a company proposed to be incorporated, and of which he styled himself secretary, did not have the effect of constituting it a corporate fund. And for the reasons noted above, it was impossible for the corporation to ratify or adopt the transaction so as to affect the character of the fund or become liable for the repayment of the loan. The fact that funds subsequently derived from the payment of subscriptions to the capital stock of the company, which came into the possession of the Citizens Bank of Senath, are said to have been retained and utilized to repay the money borrowed by Gardner, is a matter with which we cannot reckon in this action.

We regard it as altogether clear that the plaintiff receiver wholly failed to make out a case falling within the doctrine relied upon. It follows that the judgment must be reversed, and it is so ordered. *Reynolds, P. J.*, concurs.

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R. W. WALLACE & SONS MANUFACTURING COMPANY, Plaintiff, v. HAGOOD MANUFACTURING COMPANY, Defendant; SOUTHERN SURETY COMPANY, Appellant, MAYTE H. KELLY, Respondent.

St. Louis Court of Appeals. Submitted on Briefs October 3, 1916. Opinion Filed October 24, 1916.

1. **EXECUTIONS: Proceeding to Set Aside, Stay or Quash: Character of Proceeding.** A proceeding under Sec. 2244, R. S. 1909, providing for proceedings to set aside, stay or quash an execution, is not equitable in its nature, but is purely legal.

2. **———: ———: When Bond Necessary.** Sec. 2245, R S. 1909, requiring a bond for a stay of execution, on motion to quash, applies only to a motion filed before a judge in vacation, and not to such a motion filed, heard and disposed of in open court.

3. **———: Payment of Judgment Debt: Effect.** A judgment creditor cannot successfully sue out an execution after receiving payment of his debt.

4. **SUBROGATION: Executions: Rights of Surety on Appeal Bond.** The surety on an appeal bond, who, upon affirmance of a judgment by the Court of Appeals, paid the judgment, taking an assignment thereof from the judgment creditor, was not entitled to an execution against the surety on the bond given by appellant upon appealing the case from a justice's court to the circuit court, since, in paying the judgment, the surety was merely discharging its own obligation, and the judgment creditor, having received payment of his debt, could not have successfully sued out execution on the judgment, and, for the same reason, it was beyond his power to authorize any one else to do so in his name.

Appeal from St. Louis City Circuit Court.—*Hon. Leo S. Rassieur,* Judge.

AFFIRMED.

A. G. Moseley and *W. W. Herron* for appellant.

Jeffries & Corum for respondent.

(1) The surety on a second appeal bond, who, upon affirmance of the judgment appealed from, pays the same to the creditor, is not entitled to be subrogated to the

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rights of the creditor against a surety on a prior appeal bond. Stearns on Suretyship, sec. 254, p. 454, sec. 246, p. 432; Shelton on Subrogation (2 Ed.), sec. 131, p. 198; Hanby's Admr. v. Henritzi's Admr., 85 Va. 181; Wronkow v. Oakley, 133 N. Y. 510; Winston v. Rives, 4 Stew. Port. (Ala.) 269; Hinkly v. Kreitz, 58 N. Y. 583; Chrisman v. Jones, 34 Ark. 76; Fidelity Co. v. Bohen, 6 L. R. A. (N. S.) 1023; Railroad v. Dicky, 131 Pa. 86. (2) Payment by the Southern Surety Company extinguished the debt and satisfied the judgment. The Surety Company's remedy against its principal was in equity and it could not assert its rights in this summary proceedings at law. It had no right of action of any kind against the respondent, and it had no right to sue out execution on this satisfied judgment. Hull v. Sherwood, 59 Mo. 172; Bank v. Kembell, 61 Mo. App. 215; Williams v. Gerber, 75 Mo. App. 30; Burrus v. Cook, 215 Mo. 513.

REYNOLDS, P. J.—This case, a motion to quash an execution—apparently also involving another execution, in which the same situation was present, the executions different in amount only—was heard on an agreed statement of facts, to the effect that the Wallace Company brought suit in a justice of the peace court against the Hagood Company, and prevailed. The Hagood Company appealed that case to the circuit court, and the respondent here, Mayte H. Kelly, signed the appeal bond. When the case came on for trial in the circuit court, the Hagood Company lost again, and appealed to the St. Louis Court of Appeals. The appellant here, Southern Surety Company, executed that appeal bond. The Court of Appeals affirmed the judgment of the circuit court, but rendered no judgment against the Surety Company, and thereupon the Southern Surety Company paid the Wallace Company the amount of the judgment of the circuit court with interest and costs, and claimed thereby to have acquired the interest of the plaintiff in said judgment (which was against the Hagood Company and respondent) and had the same assigned to it, sued out

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execution thereon and levied on respondent's property. The respondent filed a motion in term time to quash this execution, which motion the circuit court sustained. From this the Southern Surety Company has prosecuted this appeal.

By examination of our files it appears that the judgment in the case on appeal to our court referred to, was affirmed for failure to prosecute the appeal, no opinion being handed down.

Learned counsel for appellant argue that the cause should have been heard as in equity and equitable defenses admitted. We are not advised of what these equitable defenses consist, but it is sufficient to say of this claim that a proceeding under section 2244, Revised Statutes 1909, as was this, is purely legal. [Hull v. Sherwood, 59 Mo. 172, and cases following that.]

It is further urged that as preliminary to granting the motion to quash the execution the trial court should have required a bond before staying the execution, and section 2245 is relied upon for this. That section applies only when the motion to quash is filed before the judge in vacation, and does not preclude a motion in open court. [Mellier v. Bartlett, 89 Mo. 134.] The motion here was filed and heard and disposed of in open court and no bond was necessary.

By the agreed statement of facts it is clear that the appellant, Southern Surety Company, had paid off the judgment and held it by assignment. It is determined by our Supreme Court in Hull v. Sherwood, supra, l. c. 174, under practically the same state of facts, that the judgment debtor having received payment of his debt, could not have successfully sued out an execution on the judgment, and that for the same reason it was beyond his power to authorize anyone else to do so under any pretext in his name. To like effect is the decision of our Supreme Court in Burrus v. Cook, 215 Mo. 496, l. c. 513, 114 S. W. 1065, and of our own court in Bank of Warren Co. v. Kemble et al., 61 Mo. App. 215, l. c. 217.

While it is true that no judgment was rendered in our court against the Surety Company, the effect

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of the judgment affirming that of the circuit court was to render the Surety Company liable on its bond. It recognized this by paying off that judgment—a thing it was bound to do—and hence had merely discharged its own obligation.

The judgment of the circuit court is affirmed. *Allen, J.*, concurs.

GEORGE P. JOHANNES, Respondent, v. ST. REGIS REALTY & INVESTMENT COMPANY et al., Appellants.

St. Louis Court of Appeals, October 24, 1916.

1. **GUARANTY: Building Contracts: Construction of Guaranty: Matters Covered.** A guarantor of the performance of a building contract by the contractor is bound by the specifications referred to in the building contract, providing, *inter alia*, that the architect or owner should have the right, by written order, to order alterations and additions, leaving the price therefor, if not agreed upon, to be fixed by arbitration, notwithstanding the specifications were not mentioned in the contract of guaranty.

2. **———: ———: Extra Work: Compliance with Contract: Burden of Proof.** Plaintiff, a materialman, brought suit to enforce a mechanic's lien. The owner filed a counterclaim, setting up that it had been compelled to spend a certain sum of money, in excess of the contract price, to finish the work, after the contractor had failed to do so, and that plaintiff was liable therefor under a contract by which he guaranteed the performance of the contract by the contractor. The building contract provided that the owner or the architect had the right, by a written order, to order alterations or additions to be made. It appeared that a large amount of extra work, not called for by the contract, was performed by the contractor, and the evidence as to whether or not such extra work was performed under a written order, conformably to the terms of the contract, was conflicting. Before the work was finished, the owner took the further execution and direction of it out of the hands of the contractor, and placed him on a *per diem* basis. Plaintiff contended that he was not liable under his contract of guaranty, for the reason that, in having the extra work performed without a

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written order and in placing the contractor on a *per diem* basis, there was a substantial variation of the contract, to his damage. *Held*, that, in order to establish its counterclaim, the burden rested upon defendant to prove that the extra work was ordered by a written order.

3. ———: ———: ———: ———: **Sufficiency of Evidence.** In such action, evidence *held* to support a finding that no written orders were given for the extra work as required by the contract, and that the doing of such work without such orders constituted a substantial variation of the contract, and hence plaintiff was not liable under his guaranty.

4. ———: ———: ———: ———: ———. In such action, *held* that the placing of the contractor on a *per diem* basis was a substantial variation of the contract, since its effect was to change the contractor from the position of an employer to that of a journeyman, and that the evidence was not sufficient to show that plaintiff had knowledge thereof, and hence it is *held* that plaintiff was not liable under his guaranty.

5. ———: ———: ———: **Cases Distinguished.** Lackland v. Renshaw et al., 256 Mo. 133, is distinguishable on the grounds, that the surety in that case was a corporation expressly organized to make bonds of suretyship for a consideration and a profit, and that the bond there involved was prepared by the surety company and was, under the general rules applicable in cases of that kind, to be construed most strongly against the drawer, neither of which conditions obtain in the case at bar; and that case, as well as City of Kirkwood ex rel. v. Byrne, 146 Mo. App. 481, is further differentiable on the ground that there, no damage resulted to the surety from the alterations, while here, the alterations were material and were prejudicial to the rights of the guarantor.

6. **JUDGMENTS: Entry: Sufficiency of Order.** Where the report of a referee recommended a finding for plaintiff on his claim, for a certain amount, and against defendant on his counterclaim, and after examining the testimony taken by the referee and hearing arguments on the exceptions filed by defendant, the court handed down a memorandum to the clerk, which merely contained the style and number of the case and the words "Report of referee approved," the judgment entered, conformably to the recommendation of the referee, could not be said to be the mere act of the clerk, since the order given to the clerk, embodied in the memorandum handed down by the court, was tantamount to the pronouncement of the judgment recommended by the referee and warranted the clerk in entering up the judgment in that form.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

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AFFIRMED.

Warwick Hough, Warwick M. Hough and *Frank H. Braden* for appellants.

(1) The motion of the defendant to set aside the judgment *entered by the clerk,* for the reason that the memo. handed down by the court approving the report of the referee, did not authorize or warrant the clerk in entering up a judgment which had not been *rendered by the court,* should have been sustained by the court, and said supposititious judgment should have been expunged from the record. Decker v. St. L. S. Co., 92 Mo. App. 52; Pump Co. v. Jones, 126 Mo. App. 540; Freeman v. McCrite, 147 S. W. 1102. (2) The plans and specifications are part of the contract of the St. Regis Company with Walsh; they are made so by the contract itself, and they are twice alleged to be a part of the contract by Johannes in his reply to the answer of the defendant. Burk v. Kansas City, 34 Mo. App. 580; Evans v. Graden, 125 Mo. 79. (3) While the general rule is that a surety has the right to stand on the strict terms of his contract, this rule is applied in its fullness only to *voluntary sureties who have no interest in the subject-matter of the contract.* In the case at bar, Johannes, the guarantor, received a consideration for signing the contract, said consideration being the purchase from him by the contractor of all the material necessary to complete the plastering. Boppart v. Ill. Surety Co., 140 Mo. App. 675; Martin v. Whites, 128 Mo. App. 117. (4) In building contracts, where the contract itself authorizes additions, alterations or omissions, they may be made without affecting the liability of the surety, or guarantor, provided they are in substantial conformity with the requirements of the contract. The foundation of the rule is that the sureties consented in the first instance that alterations, omissions or additions might be made. Reissaus v. Whites, 128 Mo. App. 136.

Seneca N. Taylor and *J. W. Drabelle* for respondent.

(1) Any alteration in the terms of the contract by the principals without the consent of the surety dis-

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charges the surety; and a material variation in the work contracted to be done without the consent of the surety will discharge him. Beers v. Wolf, 116 Mo. 179; Mallory Crawford Co. v. Brent, 75 Mo. App. 473; Warden v. Ryan, 37 Mo. App. 466; Killoran v. Meehan, 55 Mo. App. 427; Brewing Co. v. Hazen, 55 Mo. App. 277; Eldridge v. Fuhr, 59 Mo. App. 44; Bowman v. Heating Co., 80 Mo. App. 628; Swasey v. Doyle, 88 Mo. App. 536; Fullerton v. Gates, 89 Mo. App. 201; Chapman v. Endeberg, 95 Mo. App. 127; Burns Estate v. Fidelity & Dep. Co., 96 Mo. App. 467; School Dist. of Barfield v. Green, 134 Mo. App. 421; Beers v. Wolf, 116 Mo. 179. (2) The contention of the defendant that plaintiff, by reason of being surety for Walsh, is estopped from enforcing his mechanic's lien is untenable. Hartmann v. Berry, 56 Mo. 491; Hayden v. Wulfing, 19 Mo. App. 353; Burke v. City of Kansas City, 34 Mo. App. 570; Kamerick v. Castleman, 23 Mo. App. 487; Killoran v. Meehan, 55 Mo. App. 429; McAnow v. Ross, 53 Mo. 199; Emery v. Railroad, 77 Mo. 345; Brewing Co. v. Donnelly, 59 N. J. Law 48; Brewing Co. v. Clement, 59 N. J. Law 438; Zares v. Keck, 40 Neb. 456; Prescott Nat'l Bank v. Head, 90 Pac. 328.

REYNOLDS, P. J.—Action by the respondent Johannes, doing business as Banner Lime & Cement Company, to recover judgment against Peter Walsh for $992.10 and interest, and to establish it as a mechanic's lien against certain lots and improvements thereon, the lots being on the south side of Lindell boulevard near Kingshighway, in the city of St. Louis, the improvements consisting of a building known as the St. Regis Apartments. The account is for the plastering work done and for material furnished for it in the course of the work, the St. Regis Realty & Investment Company (hereafter for brevity called the St. Regis Company) then being the owner of the real estate and improvements thereon and Walsh contractor with that company, and the defendants Love and Dudley holding deeds of trust on the property, these executed to Dudley, as trustee for Love, by defendant Vrooman and wife, who at the time held and now

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hold title to the real estate, the deed of trust executed, as averred, to secure money used for the building of the apartment house, and the rights of the Vroomans, Love and Dudley being subject, as it is charged, to the lien claimed by plaintiff.

The defendants Love and Dudley do not appear to have pleaded. Defendant Walsh, admitting that he was the contractor for doing the plastering, denies knowledge or information sufficient whereon to form a belief as to whether the account sued on by plaintiff is correct. The defendants Vrooman and wife admit that the St. Regis Company was owner of the property when the contract for the apartments was made but that they subsequently purchased and are now owners thereof. The St. Regis Company, after admission of formal matters and admitting that it was the owner of the premises at the time of making the contract for the apartments, denies plaintiff's claim and sets up a counterclaim for $7152.35 against plaintiff. The real controversy in the case arises over this counterclaim, there being practically no denial of the correctness of plaintiff's account and that the material there charged for went into the building and the work charged for was done on it and that the prices charged are reasonable, and proper steps taken to secure the lien.

As a foundation for this counterclaim, the St. Regis Company sets up its contract with Walsh, which is as follows:

"St. Louis, April 2, 1908.

"St. Regis Realty & Investment Co.,

"City.

"Gentlemen:

"I hereby agree to do all the plastering in the building to be erected by the above Company on Lindell boulevard, known as the St. Regis Apartments, complete throughout, with acme cement plaster, according to the plans and specifications, all for the sum of thirteen thousand, five hundred and fifty dollars ($13,550), payments to be made at the rate of 85 per cent. of contract including materials, as the work progresses.

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"Said work to be done promptly when ready, and as many men put on as, in the judgment of the architect, can be properly worked.

"In case of strikes or other contingencies beyond his control, this contract is not binding until such contingencies are removed.

"[Signed] PETER WALSH."

The St. Regis Company avers that it accepted this proposal or contract of Walsh, as part consideration for which it avers that contemporaneously with the signing of the contract by Walsh, plaintiff entered into this written agreement with this defendant, namely:

"St. Louis, Mo., Apr. 2, 1908.

"St. Regis Realty & Investment Co.,

"City.

"Gentlemen:

"We hereby guarantee performance of the above contract, by the contractor, Peter Walsh, and agree to pay any sum or sums that may be due from any source by reason of his failure to complete said contract according to its terms and conditions.

"[Signed] BANNER L. & C. Co.

"GEO. P. JOHANNES, Prop."

The St. Regis Company further avers that it had accepted Walsh's contract on the faith of this guaranty and that plaintiff had due notice thereof, and that thereafter Walsh, with the consent of plaintiff, entered upon the performance of the contract and had continued therein until about the first of December, 1908, and that on or about December 1, he (Walsh) failed to perform the contract, abandoned it without just cause, and failed to pay for the labor and material necessary to complete the contract, of all of which, it is averred, Johannes had notice, and that in order to complete the contract the St. Regis Company paid out for labor and material the sum of $7152.35 in excess of the contract price and that there still remains due to various parties for materials furnished for the erection of the house the sum of $1315.01, the amount paid out for labor and material and still re-

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maining undue amounting in the aggregate to $8467.36. Judgment is prayed for $7152.35, with interest.

Except as to setting up the counterclaim the answer of the Vroomans, in addition to the matters before noted as in that answer, is on the same lines as that of the St. Regis Company.

Plaintiff filed replies to both of these answers which are substantially identical except as to that part of the St. Regis Company which deals with the counterclaim. As to that, plaintiff admits the execution of the contract set out between Walsh and the St. Regis Company and the signing by plaintiff of the guaranty as set out, and avers that he (plaintiff) held the relation of guarantor or surety for Walsh, and that after plaintiff became such guarantor or surety, the St. Regis Company and Vrooman, the beneficial owner of the property, without the knowledge or consent of plaintiff, made changes, alterations and deviations from the original contract on which plaintiff was guarantor, and deviations and departures in the execution of the work as called for in the plans and specifications, which were part of the contract, greatly enhancing the cost of the work to be done and which was actually done in plastering the building, such deviations, etc., it being averred, adding an additional cost to the plastering of the buildings of several thousand dollars. These changes and alterations and deviations are set out in great detail and it is averred that they were not included in the contract or specifications and that when many of them were ordered by the superintendent and vice-principal of the St. Regis Company, Walsh objected to them and informed those officers that the way the work was being done was an entire departure from the original plans and specifications and would make the cost of plastering many thousand dollars more than the agreed price to the hurt of his surety, and thereupon Claude E. Vrooman, vice-principal of the St. Regis Company, and then the beneficial owner and now sole owner of the apartment building, told Walsh to go ahead and that he would take care of him and his surety, and it is

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averred that each and every one of these changes, alterations and additions were made without the knowledge, consent, or assent of plaintiff and that the effect of them was to greatly increase the cost of the work and to exonerate, discharge and release him from his obligation as guarantor. It is further set out that shortly after Walsh had begun carrying out the contract on which plaintiff was surety, the St. Regis Company and Vrooman took the execution of the work out of the hands of Walsh, placed him on the payroll like any other journeyman on a basis of $6 per day, and continued to treat him as an ordinary journeyman on a basis of $6 per day and caused the work to be done under the direction and in pursuance of the orders and directions of Vrooman and the superintendent and foreman of the St. Regis Company without regard to the contract, plans and specifications, and treated the contract as of no force and effect. It is finally averred that in view of these many changes and alterations and in view of the fact that Walsh was not permitted to carry out the contract for which plaintiff became guarantor and surety, plaintiff was wholly discharged and released from any liability under his guaranty. He accordingly prays for judgment as in his petition.

The case was sent to a referee to hear and try all the issues and report his decision to the court. That referee found for plaintiff on the issues and recommended judgment in his favor for the amount of the debt and the establishment of it as a lien against the property described and found for plaintiff on the counterclaim of the St. Regis Company.

Defendants filed exceptions to the report which were overruled, the court in overruling them handing down a memorandum to the clerk giving the title of the cause, its number and the words "Report of Referee Approved." Thereupon judgment was entered in which it is set out that the exceptions to the report having been theretofore "submitted to the court upon the argument of counsel, and taken under advisement and the court having also seen and examined the said report, as well

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as the transcript of the testimony and exhibits filed therewith, and being now sufficiently advised of and concerning the same," overruled the exceptions and approved the report and entered up judgment in favor of plaintiff for the sum of $1121.07, the amount found by the referee with interest from February 27, 1909, to date, that is March 27, 1911, together with costs, and establishing a lien and ordering execution against the property described, if sufficient property of Walsh was not found. Defendants thereupon and in due time filed a motion for a new trial, in which the first ground stated is that the judgment "entered by the clerk is not warranted by the memorandum filed by the judge of this division, which memorandum makes no reference to the eighteen exceptions filed to the report of the referee, nor to any one of said exceptions." The remaining exceptions to the action of the court in approving the report of the referee are on various grounds, thirteen in number, the last one being to the failure of the court "to sustain the eighteen exceptions, and each one thereof, filed by the defendant, the St. Regis Realty & Investment Company, to the report of the referee," and in further failing to set aside that report and make a finding of its own on the testimony. This motion was overruled and an appeal duly perfected to this court by the St. Regis Company and by Vrooman and his wife, the appeal being allowed to our court. We transferred the cause to the Supreme Court, being of the opinion that the amount involved was beyond our jurisdiction. The Supreme Court holding otherwise, transferred the cause back to us.

As this was a case of involuntary reference we have carefully and patiently read all of the testimony in the case as that testimony was sent up to the trial court by the referee. We avail ourselves of the report of the latter to a considerable extent, not however, putting what we use of that report in quotation.

Our conclusion, on our own examination of the testimony in the case is that the result reached by the referee is correct.

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While the plans and specifications were in evidence they are not copied in the record. The paragraph of the specifications, however, which is copied and is most often referred to is as follows:

"The architect (or owner through the architect) may order any alterations, omissions, or additions of any kind which they may desire, giving orders therefor in writing, and the contract shall not be vitiated thereby, and no plea as to the acts, orders, directions or supervision of the architect or any person shall be submitted as the justification of any error of construction or departure from the architect's plans and specifications, etc. Should the architect and contractor fail to agree on the price of any work or materials added or omitted, then the said contractor shall proceed with the work upon order from the architect or owner and the price be left to arbitration in the usual way."

It appeared, virtually without conflict, that Walsh did a large amount of extra work not called for by the contract and amounting to $3185.15, but it will be seen that in its counterclaim the St. Regis Company does not ask judgment for this extra work as against plaintiff. It is claimed by the plaintiff that the extra work amounted to an alteration of the original contract and that that, as well as a large amount of changes which were made from the original specifications, was done without his knowledge or consent and hence released him from his guaranty. On the other hand, the St. Regis Company insists that these extras were ordered in writing and that the alterations and changes that were made in the work from that called for in the specifications were ordered in writing and in strict compliance with the clause of the specifications quoted and hence did not release the plaintiff. It was contended by the plaintiff that this clause was not binding for the reason that the specifications were not mentioned in his guaranty. As the referee found, and as we find, the guaranty of plaintiff is to the performance of the contract, and in that contract Walsh specifically agrees to do all the plastering in the building according to plans and specifications,

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hence we think, as the referee found, that plaintiff is bound by the specifications, and that extras ordered and furnished in accordance with the specifications would not release him as guarantor.

As the principal contest at the trial was over this clause of the specifications, naturally the burden of proof was upon the defendant to establish its counterclaim and to prove, by the preponderance of evidence in the case, that the list of extras upon which its claim is founded had been ordered in writing. The testimony in regard to whether there were written orders given for extras or changes is absolutely irreconcilable. Mr. Vrooman, the architect, and possibly another witness, testifies that written orders for changes and extras were given to the superintendents who were actually in charge of the work and represented Walsh, but the architect admits that he gave no written directions of any kind as to alterations or extras to Walsh. One of these superintendents, Kearney, does not remember giving Walsh any written orders for changes, and Kearney was the superintendent directly over the plastering work as we understand the testimony. He further testified that Mr. Vrooman never directed him to make any written orders in regard to the plastering to Walsh; that the only written orders which had been given him were to another concern which had demanded written orders. The defendant Walsh testifies that he never received any written orders from anybody and that Mr. Vrooman, who was practically in the position of owner and appears to have supervised the whole work himself, never gave him (Walsh) any memorandum in writing to do one thing or the other outside of and not covered by the contract or specifications, nor did anybody representing Vrooman or the architect ever give any memorandum in writing for any one to give to him (Walsh) so far as he knew. The referee concludes on this that he is compelled to hold that the defendant St. Regis Company has failed to establish its counterclaim for the extra work. "For the extra work," says the referee, and it is contended as to this by the learned counsel for appellants that this is evidence that

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the referee misconstrued the case and was taking into account extra work, no claim for which was made in the counterclaim. Reading the whole report of the referee, we do not understand that the referee fell into any mistake, even if he did use the phrase noted. The use of the phrase "for the extra work," applies not only to the extra work but to the changes and alterations that were made in the progress of the work from the specifications. Surely the doing of extra work, even if compensation is not demanded, was a substantial variation of the contract, the performance of which plaintiff guaranteed. As the referee found, and as we find, the provision in the specification quoted was intended to avoid the very controversy that is here presented by providing that any additions to or subtractions from the contract were required to be ordered in writing and the price agreed upon before the work was done, and in no instance did that occur. In addition to this it appears that the provision of the contract that 85 per cent. of the cost was to be paid Walsh as the work progressed was abandoned and Walsh placed on a per diem of $6.00 and treated as a journeyman. Defendant claims that plaintiff knew of this change but plaintiff denies this. That was a very material alteration, and we think that the evidence as to plaintiff's knowledge of it is not sufficient. Its effect was to change Walsh from the position of an employer and responsible overseer to that of a mere journeyman or foreman.

Upon the whole testimony we think plaintiff established the averments of his reply to the counterclaim.

But it is said that plaintiff was a guarantor for hire or on a valuable consideration, and unless it appeared that he was damaged by the change in the plans and specifications and by the doing of the extra work, he is not released.

The decision of our Supreme Court in Lackland v. Renshaw and American Surety Company of New York, 256 Mo. 133, 166 S. W. 314, is cited by learned counsel for appellants in support of their claim that plaintiff here, being a hired surety, one on a consideration, that the

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doctrine of *strictissimi juris* does not apply to him. It is true that it was so held, on its facts, in the Lackland case, supra. In City of Kirkwood ex rel. v. Byrne, 146 Mo. App. 481, l. c. 497, 125 S. W. 810, we announced practically the same rule, holding in that case that we did not think the surety was in any way injured by the change, which there was a mere change in the bookkeeping account.

We do not think that the decisions in either of the above cases meet the case at bar. This for several reasons: In the first place the surety in the Lackland case was a corporation, expressly organized and engaged in the business of making bonds of suretyship for a consideration and for a profit. In the next place the bond there involved had been drawn up by the surety company and was, on the general rules always applicable in cases of that kind, to be construed most strongly against the drawer. In that case as also in City of Kirkwood v. Byrne, supra, no special damage was shown by reason of the alterations. Here the fact that the changes made involved a large addition in the work to be done and the cost of the material substituted for that called for in the specifications, is here present, an element bound to increase the cost of the work beyond that which the guarantor or surety here had contracted for. The change from the 85 per cent basis to the per diem and placing Walsh on the footing of a journeyman laborer instead of that of a contractor, was material. Again, in the case at bar, while there is some evidence that plaintiff wrote himself as guarantor or surety on the consideration that all of the material required in the plastering was to be purchased from him, although this is not clearly proven, the evidence shows that a large amount of the cement which went into the construction of the building was not purchased from plaintiff, who so far as appears was able to furnish it if demanded, but was purchased from other parties, was not acme cement but an entirely different kind, and at a greatly enhanced cost over and above that of the acme cement, which was called for in the specifications.

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Without going further into the matter, as before remarked, our conclusion is that the report of the referee and the conclusion arrived at by him and adjudged by the court, are correct.

But it is assigned for error and argued that the learned trial court, in point of fact, never entered any judment in the case and that the judgment as entered up was the act of the clerk and not of the court. We cannot accede to this proposition. The learned trial court, it is true, and as before stated, handed down a memorandum to the clerk which merely gave the name of the case, its number, and the words, "Report of Referee Approved." But the record as in the abstract and in "the short form," both filed with us by appellants, show conclusively that the testimony which had been taken by the referee was before the learned trial judge; was examined by him; that his report was before the court and exceptions filed to it; that argument was heard by him, the case taken under advisement and then the report approved. The referee distinctly recommends the entry of a judgment in favor of plaintiff on his account and that the amount so found is entitled to stand as a lien against the property described. He further recommends a finding for plaintiff and against the counterclaim of the St. Regis Company. The order given to the clerk, embodied in the memorandum handed down by the court to the clerk, was tantamount to the pronouncement of the judgment recommended by the referee and warranted the clerk in entering up the judgment in form.

We see no reversible error to the prejudice of the appellants. The judgment of the circuit court is affirmed. *Allen, J.*, concurs.

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ROBERT B. McDONALD, Respondent, v. CENTRAL ILLINOIS CONSTRUCTION COMPANY et al., Appellants.

St. Louis Court of Appeals. Argued and Submitted October 24, 1916. Opinion Filed November 6, 1916.

1. **MASTER AND SERVANT: Injury to Servant: Assumption of Risk: Making Dangerous Place Safe.** The rule, that the master is not liable to the servant for injuries sustained while engaged in making a dangerous place safe, has no application where the servant has no supervision or control over the work of making the unsafe place safe, no duty to inspect, and no right to determine the time or manner of doing the work, is not his own boss, and is doing a mere detail of the work under the immediate control, orders and direction of a foreman, who has complete charge and control of the whole work.

2. ———: ———: ———. A servant never assumes the risk of his master's negligence.

3. ———: ———: **Contributory Negligence.** The fact that a servant had knowledge that the place in which he was working was dangerous, is a fact to be considered under a plea of contributory negligence; but such knowledge precludes a recovery on the ground of contributory negligence, only when the danger is so obvious that a man of ordinary prudence would have refused to work there, under the circumstances.

4. ———: ———: ———. Although an experienced eye would have seen that the wall which fell upon and injured a servant who was engaged in shoring it up, was in immediate danger of falling, nevertheless, in view of the fact that the servant was utterly inexperienced and did not know that it was dangerous and the danger was not so obvious that a man of ordinary prudence would not have worked there, he was not guilty of contributory negligence as a matter of law.

5. ———: ———: **Instructions: Assuming Facts: Commentary on Evidence.** In an action by a servant for personal injuries, an instruction that, in accepting employment, plaintiff assumed all the ordinary dangers pertaining thereto, "and, should the jury find from the evidence that the injuries sustained by plaintiff, if any, were the result of an accident, and not the negligence of defendants, as explained in other instructions, liable to occur in the performance of the work in which he was engaged, but was a risk incident thereto," he could not recover, was not erroneous, as indicating the

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opinion of the trial judge as to the facts, nor as assuming that defendants were negligent.

6. ———: ———: **Instructions: Applicability to Issues.** Said instruction was not vulnerable to the objection that it authorized a verdict on a theory of negligence not pleaded, by indicating that if defendants were guilty of any sort of negligence, plaintiff could recover, and this is true notwithstanding another instruction gave the usual definition of "ordinary care" and charged that the "omission of such care is negligence, in the sense in which that word is used in the instruction;" the instruction not purporting to state the circumstances under which plaintiff might recover, but merely, in general terms, wholly favorable to defendants, narrowing the field of liability.

7. ———: ———: **Pleading: Inexperience of Servant.** In an action by a servant for personal injuries, an allegation in the petition that the place at which plaintiff was working was unsafe, that defendant knew, or by the exercise of ordinary care would have known, of such condition, and negligently sent him into the place to work, without protection or notice of any kind, although he was ignorant and inexperienced in the premises, and defendants knew that he was, and that plaintiff was injured "by reason of the negligence of defendants above mentioned," was a sufficient statement to warrant the admission of evidence of plaintiff's inexperience.

8. **DAMAGES: Loss of Time: Instructions: Limitation.** In an action for personal injuries, the evidence tended to show that plaintiff was employed as a laborer at two dollars per day, at the time he was injured, and that that had been his vocation prior to that time, but that, subsequently, he did some work, the exact nature of which is not disclosed, in a small grocery store, and also worked "at the butcher business." The instruction on the measure of damages permitted a recovery for the "loss, if any, of the earnings of plaintiff's work as a laborer, which the jury may believe from the evidence he has sustained by reason of his injuries; such earnings, if any, to be based on the rate not exceeding two dollars per day. *Held*, that defendants' contention, that plaintiff's recovery should have been limited to the difference between what he actually earned and what he should have earned, is drawing too nice a distinction in the use of language.

9. ———: **Instructions: Waiver of Generality.** If the defendant wishes the instruction on the measure of damages to be more explicit, he should make a request to that end.

10. ———: **Instructions: Refusal: Matters Covered by Other Instructions.** In an action by a servant for personal injuries, the refusal of an instruction, that plaintiff could not recover for permanent insomnia, was not reversible error, where the court instructed that plaintiff could not be allowed anything for permanent nervous injuries and shock, since the latter instruction sufficiently excluded insomnia, which is but a symptom of nervous injury and shock.

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11. **APPELLATE PRACTICE: Refusal of Instructions: Review: Excessive Number of Instructions.** The appellate court will not critically examine refused instructions, to determine whether or not they should have been given, where the party who asked for same requested so great a number of instructions as to tend to produce confusion and resultant error.

12. **———: Review: Necessity of Raising Point in Motion for New Trial.** The objection that the verdict is contrary to the instructions is not available to appellants, where it was not called to the attention of the trial court in the motion for a new trial.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

AFFIRMED.

Anderson, Gilbert & Levy for appellant, Central Illinois Construction Company.

John B. Hardaway for appellant, St. Louis Electric Bridge Company.

(1) The court erred in overruling the demurrers to the evidence. Plaintiff was ordered to shore the ditch and it is an absurdity to say that the master should have shored so that the plaintiff could do the work of shoring. Henson v. Pack. Co., 113 Mo. App. 621; Miller v. Walsh, 145 Mo. App. 135; Batty v. Power Co., 79 N. Y. App. 47; Coal Co. v. Bruzas, 223 Ill. 601. Where a servant does not say anything to the master about a situation he thinks dangerous, he cannot recover for injuries therefrom. Warmington v. Railroad, 46 Mo. App. 170; Harris v. Railroad, 40 Mo. App. 265. Where the servant trusts to his own judgment, there is no recovery. Jones v. Cooperage Co., 134 Mo. App. 329. And where the interpreting facts are undisputed, he will not be permitted to say he relied on the master. Knorpp v. Wagner, 195 Mo. 668, 665. When the order to shore was given, plaintiff thought the bank was dangerous and likely to fall if not shored and said nothing to the foreman about the danger. In these circumstances no recovery can be

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had. Haviland v. Railroad, 172 Mo. 106, 117. He does not in such circumstances rely on an assurance of safety from the master. In addition to the fact that plaintiff says he understood the wall was likely to fall, the order to shore in itself was notice of the danger. Henson v. Pack. Co. 113 Mo. App. 621, (2) The court erred in giving instructions numbers 3 and 7 of its own motion. (a) Instruction 3 assumes that defendants were negligent. By it the jury are told there can be no recovery if the "injury sustained by plaintiff, if any, was the result of an accident and not the negligence of the defendants, as explained in other instructions." The instruction says injury, "if any," but assumes the negligence. Such assumptions are erroneous: Bryan v. Lamp Co., 176 Mo. App. 729; Stone v. Hunt, 94 Mo. 475, 480; Comer v. Taylor, 82 Mo. 341, 347; Plummer v. City, 70 Mo. App. 601; Glover v. Railroad, 129 Mo. App. 563, 575; York v. Everton, 121 Mo. App. 645; Muncie v. Bevier, 124 Mo. App. 15; Evans v. City, 76 Mo. App. 22; Morrell v. Lawrence, 203 Mo. 363, 380. (b) This instruction does not correctly state the law. Verdict should not be for defendants only in event the plaintiff's injuries resulted from accident and not from "the negligence of defendants," but must be for defendants if the injuries did not result from the particular acts pleaded. By this instruction 3 the jury are told to find a verdict for defendants if plaintiff's injuries resulted from accident and "not the negligence of the defendants, as explained in other instructions." There are no other instructions explaining the "negligence of defendants" and this instruction is reversible error. By instruction 7 ordinary care is defined and the jury are told "the omission of such care is negligence in the sense in which that word is used in these instructions." If instruction 7 be taken as defining defendants' negligence, then a verdict is authorized for omission to use ordinary care and this is broader that the petition. A verdict cannot stand where there are specific allega-

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tions of negligence, and the instruction merely authorizes a recovery for failure to use care. Beave v. St. Louis Transit Co., 212 Mo. 331, 351; Abbott v. Railroad, 83 Mo. 271, 278; Price v. Railroad, 72 Mo. 414, 419; Dalton v Refining Co., 188 Mo. App. 529, 548; Feldeworth v. Railroad, 181 Mo. App. 640; Clark v. Motor Car Co., 177 Mo. App. 623, 628, 629; Crone v. St. Louis Oil Co., 176 Mo. App. 344, 349; Bryan v. Lamp Co., 176 Mo. App. 728. (3) The court erred in admitting evidence of plaintiff's inexperience. There is no averment in the petition under which this evidence was admissible. It is true there is an allegation he was inexperienced, but this inexperience is in no way alleged to be connected with plaintiff's injuries and such causal connection is essential. Bryan v. Lamp Co., 176 Mo. App. 716, 728. (4) The court erred in giving instruction number 2 on the measure of damage. By this the jury are directed to allow plaintiff his "loss, if any, of the earnings of plaintiff's work as a laborer." Plaintiff, who is entitled to recover, cannot recover his loss of earnings from a particular occupation. He may have worked at some other occupation (as plaintiff did). The proper measure is the difference between his earnings, no matter from what occupation he may have subsequently derived an income. (5) The court erred in refusing to give instruction number 25, directing the jury they could allow plaintiff nothing for permanent insomnia. This element of damage was pleaded and the petition was read at length to the jury. No evidence was offered to prove it and the jury should have been directed, as requested, to allow nothing of it. Where defendant desires a specific instruction it must be asked. Fisher v. Transit Co., 198 Mo. 591. (6) The verdict is against the law, and the evidence, and was the result of passion and prejudice on the part of the jury. A verdict contrary to the instructions cannot stand. Allen v. Transit Co., 183 Mo. 411, 432; Rafferty v. Railroad, 15 Mo. App. 559. (7) The court

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erred in overruling the applications for a continuance. Defendant did not come into court prepared to meet a charge of plaintiff's inexperience, but to meet those charges pleaded, namely, negligence in not shoring, thereby making the place unsafe. Defendant is not supposed to anticipate unpleaded acts. McDonald v. Const. Co., 183 Mo. App. 415; Trigg v. Lbr. Co., 187 Mo. 237; Compton v. Railroad, 147 Mo. App. 420.

Earl M. Pirkey for respondent.

(1) Where the master directs the servant to work in an unbraced trench and the trench caves in and injures the servant because unbraced, the master is liable. Barnard v. Waverly Brick and Coal Company, 189 Mo. App. 417; Quigley v. Bambrick, 58 Mo. App. 192; Carter v. Baldwin, 107 Mo. App. 217; Scott v. City of Springfield, 81 Mo. App. 312; Deweese v. Meramec Iron Co., 54 Mo. App. 476, 128 Mo. 423; Etledge v. Railroad, 100 Cal. 282; Finn v. Cassidy, 165 N. Y. 584; City of Chattanooga v. Powell, 179 S. W. 808, 133 Tenn. 137. (2) The rulings made on a former appeal are the law of the case when it comes before the court on a second appeal; and all matters passed upon in the former decision will be deemed *res adjudicata* and no longer open for dispute. Chapman v. Railroad 146 Mo. 494; Miller v. Town of Canton, 123 Mo. App. 333; Brummell v. Harris, 162 Mo. 403. (3) The servant assumes such risks only as are incident to work after the master has performed his full duty. Fleming v. What Cheer Mining Company, 186 S. W. 1115; Erwin v. Tel. Co., 173 Mo. App. 535; Bennett v. Lime Company, 146 Mo. App. 575; George v. Railroad, 225 Mo. 406; Jewell v. Bolt and Nut Company, 231 Mo. 199; Strickland v. Woodworth & Co., 143 Mo. App. 528. (4) Where eleven or more instructions are asked, the trial court is justified in refusing all or any number less than all of those asked on the ground of their number alone. Renshaw v. Fireman's Ins. Co., 33 Mo.

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App. 400; Barrie v. Transit Company, 119 Mo. App. 52; McAllister v. Barnes, 35 Mo. App. 674; Cutts v. Davidson, 184 S. W. 921; Sidway v. Missouri Land and Live Stock Co., 163 Mo. 376. (5) It is not error to refuse a cautionary instruction unless there is an abuse of discretion. Wiedemann v. St. Louis Taxicab Company, 182 Mo. App. 529. (6) It is not error to refuse any instruction where its substance is covered by an instruction given. Wiedemann v. Taxicab Co., 182 Mo. App. 529; Flaherty v. Transit Co., 207 Mo. 338; Trebbe v. American Steel Foundries, 185 S. W. 179; Missouri Valley Bridge and Iron Co. v. Blake, 231 Fed. Rep., 417. (7) A servant injured in doing work is not chargeable with selecting the more dangerous method of work where he is doing it as ordered by the master's foreman. Henson v. Pascola Stove Co., 190 Mo. App. 471; Barnard v. Waverly Brick and Coal Co., 189 Mo. App. 421; Erwin v. Telephone Co., 173 Mo. App. 532. (8) Where the master has negligently failed to furnish safe appliances or a safe place, and the servant knows it, he can still recover unless the danger is so glaringly threatening that a man of ordinary prudence would not use them. Bennett v. Lime Co., 146 Mo. App. 575; Carter v. Baldwin, 107 Mo. App. 217; Wendler v. People's Housefurnishing Co., 165 Mo. 527; George v. Railroad. 225 Mo. 411; Jewell v. Bolt and Nut Co., 321 Mo. 201. (9) The law does not permit a party litigant to assume inconsistent positions in court. Bensieck v. Cook 110 Mo. 182. (10) The court will not reverse a judgment for an error not called to the attention of the trial court in the motion for a new trial. Gardner v. Met. St. Ry. Co., 223 Mo. 413. (11) Two successful trials in the same case are evidence of merit of respondent's case. In re Estate of Imboden, 128 Mo. App. 575 (12) Instruction No. 3 given by the court of its own motion was approved by this court. Fogus v. Railroad 50 Mo. App. 272.

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HENRY S. CAULFIELD, Special Judge.—Suit for damages for personal injuries resulting to plaintiff in consequence of an earth embankment caving in upon him while he was working in a trench at the base. He recovered judgment for $4200 against the defendants, Central Illinois Construction Company and St. Louis Electric Bridge Company, and both of them have appealed. This is the second time the case has been here on appeal. [See 183 Mo. App. 415, 166 S. W. 1087.] The suit proceeds as for the breach of the obligation of the defendants, as plaintiff's employers, to exercise reasonable care to furnish him a reasonably safe place to work, and the petition avers, also, that defendants negligently sent plaintiff into a dangerous place to work without apprising him of the danger, though he was inexperienced and ignorant in the premises and defendants knew it. The answer of the Bridge Company was a general denial; that of the Construction Company contained a general denial, an admission that plaintiff was in its employ, a plea of assumption of risk and of contributory negligence. The defendant Central Illinois Construction Company offered no evidence. The defendant St. Louis Electric Bridge Company offered none, except a portion of plaintiff's testimony given on a former trial. The facts will sufficiently appear in connection with our disposition of the questions involved.

The defendants contend that the trial court erred in overruling their respective demurrers to the evidence. Under this head they suggest that, inasmuch as plaintiff's work had to do with the shoring up of the bank, by the caving in of which he was injured, he was engaged in making an unsafe place safe, and therefore the rule requiring the master to furnish the servant with a safe place to work does not apply. [Citing Henson v. Armour Packing Co., 113 Mo. App. 618, l. c. 621, 88 S. W. 166, and Miller v. Walsh, 145 Mo. App. 131, l. c. 135, 129 S. W. 458.] It is true that, when plaintiff was injured, he was engaged as a laborer in

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digging a place opposite, but near, the embankment, in which, it was contemplated by defendants' foreman, the end of a plank should be inserted, with a view to shoring up the embankment, but it also clearly appears that plaintiff had no supervision or control over the work of shoring, no duty to inspect, no right to determine the time or manner of doing the work, was not his own boss, and was doing a mere detail of the work under the immediate control, orders and direction of the defendants' foreman, who had complete charge and control of the whole work. Under these circumstances the rule, urged upon us by defendants, that the master is not liable to the servant for injuries sustained while engaged in making a dangerous place safe, etc., has no application. [Corby v. Missouri & Kansas Tel. Co., 231 Mo. 417, 132 S. W. 712; Reid Coal Co., v. Nichols (Tex. Civ. App. 1911), 136 S. W. 847; Bloomfield v. Worster Construction Co., 118 Mo. App. 254, 94 S. W. 304; Hall v. Wabash R. R. Co., 165 Mo. App. 114, 145 S. W. 1169.]

Nor is there any room in this case for the suggestion that plaintiff, having knowledge of the danger, assumed the risk. The evidence tends to prove that plaintiff's injuries resulted from the defendants' negligence, and the servant never assumes the risk of the master's negligence. If the plaintiff had knowledge of the danger, then that is a fact to be considered under the plea of contributory negligence, but under that head such knowledge precludes a recovery only when the danger is so obvious that a man of ordinary prudence, under the circumstances, would have refused to do the master's bidding. [Wendler v. People's House Furnishing Co., 165 Mo. 527, 65 S. W. 737.] While the evidence tends to prove that, to the experienced eye, the wall was in immediate danger of falling and therefore the defendants' foreman was negligent in ordering plaintiff to work under it, without at least warning him of the danger, it also discloses that plaintiff was utterly inexperienced in the premises, and that the

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danger was not so obvious to a man of ordinary prudence, under the circumstances, that we may declare him guilty, as matter of law, of negligence in not refusing to obey the order of his foreman. While he testified that he thought that the embankment was not safe, was dangerous, or that the defendants' foreman would not want to shore it, he also said that he did not *know* that it was dangerous; that he thought the foreman would not send him into the place if it was dangerous; that when they put him to work there he figured that it was safe. It appeared that the wall had stood as it was for some two months; and taken as a whole it may be inferred that while, in a general way, plaintiff concluded that the shoring was necessary in order to make the embankment safe, there is no conclusive, if any, showing that the imminence of the danger was obvious to him or should have been.

Defendants further contend that the following instruction, given by the trial court of its own motion assumes that defendants were negligent and authorizes a verdict for negligence not pleaded:

"In accepting employment in the service of the defendants, or either of them, for the performance of the work shown in the evidence, plaintiff assumed all the ordinary dangers and hazards pertaining to such work, and should the jury find from the evidence that the injury sustained by plaintiff, if any, was the result of an accident and not the negligence of the defendants, as explained in other instructions, liable to occur in the performance of the work in which he was engaged at the time of said accident, but was a risk incident thereto, then the plaintiff cannot recover, and the jury should find for the defendant."

This form of instruction was approved in the case of Fogus v. Chicago & A. R. R. Co., 50 Mo. App. 250, l. c. 272. It is favorable only to the defendants, and there is nothing in its language to indicate an opinion of the trial judge as to the facts. It does not assume that defendants were negligent.

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Nor are we persuaded that it authorizes a verdict for negligence not pleaded. To say, as in effect this instruction did say, that plaintiff could not recover if defendants were guiltless of negligence, does not convey the thought that plaintiff might recover if defendants were guilty of any negligence "under the sun." That thought was not suggested by the instruction. The instruction does not authorize a verdict at all. It does not purport and could not be taken to state the circumstances under which plaintiff might recover, but in general terms, wholly favorable only to the defendants, merely narrowed the field for consideration by the jury. And the fact that another instruction gives the usual definition in general terms of "ordinary care" and states that "the omission of such care is negligence in the sense in which that word is used in these instructions" and the fact that the word "negligence" is literally used only in the instruction under consideration, do not alter our view above expressed.

The court did not err in admitting evidence of plaintiff's inexperience. The petition sufficiently alleges the dangerous and unsafe condition of the place in which plaintiff was put to work, that defendants knew, or by the exercise of ordinary care would have known, of such condition, and negligently sent him into the place to work without protection or notice of any kind, though he was ignorant and inexperienced in the premises, and defendants knew that he was, and that plaintiff was injured "by reason of the negligence of defendants *above mentioned.*" This was a sufficient statement to admit evidence of plaintiff's inexperience.

Defendants contend that the court erred in that part of the instruction on the measure of damages that allows the plaintiff to recover "the loss, if any, of the earnings of plaintiff's work as a laborer, which the jury may believe from the evidence plaintiff has sustained by reason of his injuries and directly caused thereby, such earnings, if any, to be based on the rate

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not exceeding $2 per day." There was evidence that though plaintiff was employed as a laborer at $2 per day at the time he was injured, and that had been his vocation prior to his injury, he did subsequently do some work (the exact nature of which is not disclosed) in a small grocery store and also worked some "at the butcher business." And defendants contend in effect that his recovery should have been limited to the difference between what he actually earned and what he would have earned as a laborer. This appears to us to be drawing too nice a distinction in the use of language. It would seem that he could have suffered no greater "loss" in his earning as a laborer than the difference mentioned, and the jury must have so understood. If the defendants wished the instructions to be more explicit in the respect complained of they should have made a request to that end.

Defendants complain that the trial court refused an instruction directing that plaintiff could not recover for permanent insomnia. But the court did instruct the jury that they could not allow plaintiff anything for "permanent nervous injuries and shock," and we are of the opinion that that sufficiently excluded insomnia which is but a symptom of nervous injury and shock. Moreover, the defendants asked twenty-one instructions, a number so great as to tend to produce confusion and resultant error, and we are therefore not inclined to examine critically those refused.

The objection that the verdict is contrary to the instructions is not available to the defendants because it was not called to the attention of the trial court in the motions for new trial.

We have duly considered the other points suggested in defendants' brief and do not consider them worthy of extended discussion. They are without any substantial merit.

The judgment is affirmed. *Reynolds, P. J.*, and *Allen, J.*, concur.

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MARGARET M. REBER, Respondent, v. BELL TELEPHONE COMPANY OF MISSOURI, Appellant.

St. Louis Court of Appeals, November 6, 1916.

1. **MASTER AND SERVANT: Injury to Third Person: Scope of Servant's Employment.** The master is liable to a third person for torts committed by the servant, when it can be fairly implied that he was acting within the scope of his employment and was in the pursuit of the master's business and at the master's direction.
2. **TRESPASS: Joint Tortfeasors: Joint and Several Liability.** When a trespass is committed by co-operation, or by the joint act of two or more persons, each is liable for the injury done by all, and all who aid and abet in the commission are equally liable therefor.
3. **TELEGRAPHS AND TELEPHONES: Use of Streets: Trees: Trespass.** A telephone company is entitled, as a *quasi* public corporation, to erect its poles along a street and string wires thereon, under license from the municipality; but this right is subject to that of the abutting property owner to maintain trees projecting over the streets.
4. ———: ———: ———: ———. A telephone company, desiring to string wires along a street, has no right to take the law in its own hands, and disfigure, mutilate and damage the trees of an abutting property owner at will, without being liable to respond in damages therefor.
5. ———: ———: ———: ———. It is the duty of a telephone company, desiring to string wires along a street, to take measures to mitigate or avoid damages to the trees of an abutting property owner, where practical, even though such measures are more expensive or less convenient.
6. ———: ———: ———: ———: **Defenses.** It was no defense to an action for damages against a telephone company for cutting shade trees, projecting over a street along which the company was stringing its wires, that the street commissioner of the city was present, giving orders and directions regarding such cutting, where it did not appear that he had authority to direct such cutting, nor that the branches were cut for any other purpose than to aid the company in the prosecution of its business in the way most convenient to it.
7. ———: ———: ———: ———: **Punitive Damages.** Where a telephone company seriously injured valuable shade trees which projected over the street, by cutting a space for its wires to pass through them, a verdict for punitive damages in favor of the property owner was justifiable.
8. **DAMAGES: Punitive Damages: Necessity of Actual Damage.** Nominal actual damages will support a verdict for punitive damages.

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Appeal from St. Louis City Circuit Court.—*Hon. Rhodes E. Cave,* Judge.

AFFIRMED.

Holland, Rutledge & Lashly for appellant.

(1) The court in giving a peremptory instruction to find for respondent in the sum of $1 committed no error of which respondent may complain, because while the testimony showed that some of the trimming of trees on respondent's property was done by linemen on the payroll of the appellant, there was no testimony that such trimming was done under the direction of appellant. (2) The court in giving a peremptory instruction to find for respondent in the sum of $1 committed no error of which respondent may complain, because while the testimony showed that some of the trimming of the trees was done by linemen on the payroll of appellant and by linemen on the payroll of Suburban Electric Light & Power Company, there was no testimony to show what trimming was done by the linemen on the payroll of the former and what by linemen on payroll of the latter. Therefore, even had the said trimming been done by said linemen as employees of the respective companies, there was no testimony upon which a jury in any event could base a verdict against either company for substantial damages. Epperson v. Postal Telegraph Co., 155 Mo. 346, 382. (3) Even had the testimony shown that all the trimming of trees in question was done by employees of appellant under the latter's direction, respondent would not be entitled to recover, because the placing of telephone poles on a public sidewalk is not subjecting the property to any new easement, and therefore the abutting owner cannot complain of any resulting damage. Julia Building Association v. Bell Telephone Co., 88 Mo. 258. In the present case, there is a presumption that the City of Webster Groves, before causing its street commissioner to direct the removal of the

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poles and the trimming of the trees, had passed proper and necessary ordinances in reference thereto. Kavanaugh v. City of St. Louis, 220 Mo. 496; Chlanda v. Railroad, 213 Mo. 262; State ex rel. Brown v. Wilson, 216 Mo. 215; United Shoe Machinery Co. v. Ramlose, 210 Mo. 631; Chouteau v. Railroad, 122 Mo. 375; Bank of United States v. Dandridge, 6 Law Ed. Supreme Court Reports 62, 12 Wheaton, 552; Wyrick v. Railroad, 74 Mo. App. 406. (4) The court in giving a peremptory instruction to find for respondent in the sum of $1 committed no error of which respondent may complain, because there was no testimony of wilful or wanton conduct on the part of appellant.

C. A. Newton, E. W. Mills and *C. S. Reber* for respondent.

(1) In passing upon the propriety of the action of a trial court in taking a case from the jury by a peremptory instruction, the appellate court must consider the plaintiff's evidence as a whole in the light most favorable to plaintiff, indulging in every inference of fact in plaintiff's favor which the jury could with any degree of propriety indulge. Steffen v. Fisher, 161 Mo. App. 393; Scott v. Smelting Co., 187 Mo. App. 352; Whittaker v. Railroad, 252 Mo. 452; Harris v. Railroad, 180 Mo. App. 604; Perline v. Oil Co., 182 S. W. 1015. (2) The court rightly granted a new trial because of the error in its peremptory instruction given at the close of the plaintiff's case, confining plaintiff's recovery to one dollar, actual damages. The evidence introduced justified a recovery against appellant in a substantial sum on either of two theories: (a) Either as a joint tort-feasor engaged in the commission of a joint tort on the theory that the trespass committed by the two companies was in furtherance of a common purpose or object and concurrently committed. Yealy v. Fink, 43 Pa. 212; Ferguson v. Savoy, 9 New Bruns, 263; Powell v. Thompson, 80 Ala. 56; Swain v. Tennessee Copper Co., 111 Tenn. 430; Clark v. New-

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san, 1 Ex. 131; Addison on Torts (8 Eng. Ed.), p. 118; Underhill on Torts (9 Eng. Ed.), p. 50; Murphy v. Wilson, 44 Mo. 313. (b) Or on the theory that appellant, as an individual trespasser, was liable only for the damages committed by its own linemen. When the uncertainty existing as to the extent of the damage inflicted by a particular wrongdoer is the result of his own act, he cannot complain if the jury is permitted to make the best estimate which the nature of the case admits of as to the damage done by such tort-feasor. Any other rule would encourage wrongdoing by favoring the wrongdoer at the expense of the innocent and injured party. Ogden v. Lucas, 48 Ill. 492; Railroad v. Hoag, 90 Ill. 339, 346; Schriever v. Village of Johnston, 71 Hun. (N. Y.) 232; Learned v. Castle, 78 Calif. 454; Washington v. Gillman, 64 Mo. 173; Jenkins v. Railroad, 67 N. J. L. 331; Whitney v. Welshaus, 50 Pa. Super. 427; Weidman Silk Dyeing Co. v. Newark, 84 Atl. 273; Harrison v. McClellan, 137 N. Y. App. Div. 513; Railroad v. Coons, 43 Ill. App. 119; Peltz v. Eichels, 62 Mo. 181; Scott v. Smelting Co., 187 Mo. App. 353. (3) (a) Even if the recovery was properly limited to merely nominal damages, the plaintiff was nevertheless entitled to a recovery of punitive damages. Favorite v. Cottrell, 62 Mo. App. 119; Lampert v. Drug Co., 238 Mo. 409. (b) The evidence introduced clearly justified the jury in finding that the trespass complained of was both wanton and malicious—wanton because unnecessary, and malicious because intentionally done with knowledge of its wrongful nature. It was unnecessary because the wires could have been maintained at the old thirty-foot level, at which level no cutting was necessary at all. Moore v. Carolina Light & Power Co., 79 S. E. 596; Van Siclen v. Electric Light Co., 45 N. Y. App. Div. 1. It was unnecessary because the wires, even if maintained at the new forty-five-foot level, could have been carried through the trees by cabling, and this method the company was bound to resort to although it might have involved additional expense. Van Siclen v. Electric Light Co., 45 N. Y. App. Div. 1.

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(c) It was a malicious trespass because at the time it was committed the company knew it had no right to cut the trees. The trespass being malicious, plaintiff's right to recover punitive damages is undeniable. Bright v. Bell, 113 La. 1090; Memphis Bell Telephone Co. v. Hunt, 84 Tenn. 459; Tissot v. Telephone Co., 39 La. Ann. 996; Cumberland Tel. Co. v. Cassidy, 78 Miss. 666; Cumberland Tel. Co. v. Shaw, 102 Tenn. 317; Daily v. State, 51 Ohio St. 348; Jones on Telegraph Companies, p. 120; Russellville Home Tel. Co. v. Commonwealth, 33 Ky. L. Rep. 132; Slago v. Realty Co., 183 Mo. App. 299; Smith v. Railroad, 192 Mo. App. 210; McMillan v. Elder, 160 Mo. App. 406; Jennings v. Railroad, 159 Mo. App. 17. (4) That a telephone company has no right to cut the limbs of trees standing on private property to clear a space for its wires without the owner's consent is also undeniable, in spite of the fact this appellant does deny it. State v. Graeme, 130 Mo. App. 138; McAntire v. Joplin Tel. Co., 75 Mo. App. 535; Reinhoff v. Electric Co., 177 Mo. App. 417.

ALLEN, J.—This is an action to recover damages for injuries done to certain shade trees belonging to plaintiff, situated upon her property in Webster Groves, Missouri, abutting on the north line of Lockwood avenue, a public street extending from east to west in said city. It appears that certain telegraph poles of defendant had for years stood in Lockwood avenue near the northern edge of the roadway, i. e., somewhat south of the north curb; that Lockwood avenue was improved, necessitating the removal of these poles, and that defendant thereupon erected new poles north of the curb line. The old poles were about thirty feet in height, whereas the new poles erected north of the curb line were about forty-five feet in height. Plaintiff's trees—said to have been large, handsome shade trees—stood north of the curb line on plaintiff's land, but branches thereof extended beyond the sidewalk and curb into the street, and, it seems, interfered with the stringing of wires along these new poles in the manner in which de-

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fendant, for its convenience, proposed and desired to string such wires. Defendant did not obtain permission to cut the branches of these trees for the purpose of extending its wires through them, but on or about December 1, 1908, at a time when a caretaker in charge of the premises was absent, defendant's agents and servants entered upon plaintiff's premises and cut, mutilated and disfigured the trees, causing much damage thereto. And there is evidence that the work of removing branches from the trees was unskillfully done, causing unnecessary injury even for defendant's purposes.

It appears that wires of the Suburban Electric Light & Power Company, a corporation not a party to the suit, had been strung along and carried by the old poles, and were to be placed upon the new poles together with defendant's wires; that at the time of the alleged trespass aforesaid some servants of the last-named company took part in cutting and removing the branches from the trees. It is said that some linemen of the Suburban Electric Light & Power Company, in charge of a foreman, happened to be passing at the time, and the foreman deemed it advisable to stop and assist defendant's agents and servants in the doing of this work. There is also testimony that one Safford, said to have been a street commissioner of the city of Webster Groves—who died prior to the trial below—was present giving orders and directions respecting the cutting of branches from plaintiff's trees.

At the close of the evidence the court peremptorily instructed the jury to return a verdict for plaintiff for nominal damages only, which the jury accordingly did. Thereafter the court, on plaintiff's motion, granted plaintiff a new trial, from which order granting a new trial the defendant prosecutes the appeal now before us.

The court's action in granting a new trial for error in giving the instruction compelling a verdict for plaintiff for nominal damages only was manifestly correct Defendant—appellant here—takes the position that plain-

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tiff cannot complain of the giving of that instruction for the reason that while the testimony showed that some of the cutting of the trees on plaintiff's property was done by linemen in the employ of defendant, there was no testimony that this was done under the defendant's direction. But this entirely overlooks and fails to reckon with the great mass of evidence in the case showing not only that the cutting and mutilation of the trees was done, in a very considerable part at least, by defendant's agents and servants, but was done under circumstances which legitimately afford the inference that such agents and servants were acting within the scope of their employment as defendant's employees, in pursuit of their master's business and at their master's direction.

Evidently the trial court gave the instruction to find a verdict for nominal damages only upon the theory that since the evidence showed that some of the damage done to plaintiff's trees was done by servants of defendant and some by servants of the Suburban Electric Light & Power Company, plaintiff could not recover substantial damages without adducing evidence tending to show the extent of the injury separately inflicted by defendant's servants. This, however, was a misconception of the legal effect of the evidence adduced; and the court cured its error by granting a new trial. The evidence makes it appear that servants of defendant and those of another company were jointly engaged in a common enterprise, in the prosecution of which they jointly committed a trespass upon plaintiff's property. The employees of the two companies, acting in concert for the accomplishment of a common purpose and design, cut from plaintiff's trees numerous branches which were hauled from the premises in defendant's wagons driven by its employees. "The law is well settled that when a trespass is committed by co-operation, or by the joint act of two or more persons, each is liable for the injury done by all, and all who aid and abet in the commission are equally liable therefor." [Walters v. Hamilton, 75 Mo. App. 237, l. c. 243, 244.]

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The evidence shows that the servants of both companies, acting together in the furtherance of a common purpose or object, committed the trespass and caused the damage of which plaintiff complains. Both companies, therefore, and all who as their agents participated therein, are jointly and severally liable therefor. [See Walters v. Hamilton, supra; Murphy v. Wilson, 44 Mo. 313; Cooper v. Johnson, 81 Mo. 483; Dyer v. Tyrrell, 142 Mo. App. 467, 127 S. W. 114; Robinson v. Mining Co., 178 Mo. App. 541, 163 S. W. 885; Swain v. Tennessee Copper Co., 111 Tenn. 430, 78 S. W. 93; Addison on Torts (8th Ed. 1912) p. 118.]

Defendant, as a *quasi*-public corporation, was entitled to erect its poles along the street and string wires thereon, under license from the municipality, but this right was subject to that of plaintiff, as an abutting property-owner, to maintain trees situated as were these. And in no event could defendant take the law into its own hands, and disfigure, mutilate and damage her trees at will, without being liable to respond in damages therefor. [See McAntire v. Joplin Telephone Co., 75 Mo. App. 535; State v. Graeme, 130 Mo. App. 138, 108 S. W. 1131; Reinhoff v. Gas & Electric Co., 177 Mo. App. 417, 162 S. W. 761.]

It is said that the wires in question could have been placed on the new poles at a height of thirty feet —the height of the old poles—without any material interference by the limbs of these tree. And it appears that defendant might have maintained its wires at the new level of forty-five feet without damaging plaintiff's trees, by use of a cable at this place. And it has been held that such measures, where practical, must be resorted to, even though they are more expensive or less convenient, in order to avoid the cutting of trees of abutting property-owners. [See Van Siclen v. Electric Light Co., 45 App. Div. 1 (N. Y.), affirmed in 168 N. Y. 650; Moore v. Carolina Light & Power Co., 163 N. C. 300, 79 S. E. 596.] But in the case before us, whatever may have been defendant's rights, had it taken lawful steps to secure them, it is entirely clear that if, in dis-

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regard of plaintiff's rights, defendant, taking the law into its own hands, cut and injured plaintiff's trees in order to place its wires as it chose, it thereby made itself liable to plaintiff for the damage thus occasioned.

It is further argued that defendant is not liable because of the evidence making it appear that a street commissioner of the city of Webster Groves was present giving orders and directions regarding the cutting of plaintiff's trees. But it is plainly manifest that the mere presence of the street commissioner, and his participation, if any, in the trespass, can afford no protection to defendant under the circumstances. It does not appear that the street commissioner had any authority whatsoever to direct the cutting of limbs from these trees for the purpose of enabling defendant to string its wires along its new poles at the new level of forty-five feet. There is no evidence whatsoever that the trees interfered in any way with the use of the street by the public; but it does appear that they were ornamental shade trees, such as add much to the beauty and attractiveness of a street. The right, if any, of a street commissioner of a city such as Webster Groves to trim trees of an abutting property-owner when the branches thereof extend into the street and interfere with its use by the public, is a matter with which we are not here concerned. So far as this record discloses, the branches of these trees interfered only with the defendant in the prosecution of its business in the way most convenient to it. And they were cut to enable defendant to so prosecute its business. [In this connection see Memphis Telephone Co. v. Hunt, 84 Tenn. 456.]

The evidence is further of such character as to warrant a jury in returning a verdict for punitive damages gainst defendant as for willful and malicious trespass. [See Moore v. Power & Light Co., supra; Telephone & Telegraph Co. v. Shaw, 102 Tenn. 213; Bright v. Bell, 113 La. 1078; Cumberland Telephone & Telegraph Co. v. Cassedy, 78 Miss. 666; Jennings v. Appleman, 159 Mo. App. 12; McMillan v. Elder, 160 Mo. App.

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399.] Indeed had plaintiff only made out a case for nominal compensatory damages, this would not necessarily have prevented the recovery of punitive damages by her. As to whether or not punitive damages may be recovered where only nominal compensatory damages are allowable, the authorities are conflicting; but it is now the settled law of this State that a verdict for nominal actual damages will support a verdict for punitive damages. [Lampert v. Drug Co., 238 Mo. 409.]

The action of the circuit court in granting a new trial is affirmed. *Reynold, P. J.*, concurs.

RUDOLPH WURLITZER COMPANY, Respondent, v. TEKLA ROSSMANN, Appellant.

St. Louis Court of Appeals. Submitted on Briefs, October 4, 1916. Opinion Filed November 6, 1916.

1. **BILLS AND NOTES: Defenses: Failure of Consideration: Statute.** Under Sec. 9999, R. S. 1909, the absence of consideration for a promissory note is a matter of defense as against any person not a holder in due course.

2. **———: Sufficiency of Consideration: Benefit to Third Party.** It is not necessary that the consideration for a promissory note pass directly to the maker, but it is sufficient if it passes to a third party.

3. **ACTION: Equity: Mistake of Fact.** Mistakes of fact are not cognizable by a court of law in a purely legal action, equity having exclusive jurisdiction, by an action for reformation.

4. **BILLS AND NOTES: Defenses: Mistake in Signature.** In an action at law upon a promissory note, the fact that the maker, through mistake, signed a note so as to bind himself individually, instead of signing in a representative capacity, so as to bind his principal, is not available as defense; the remedy being in equity.

5. **———: Varying Terms: Mistake in Signature: Parol Evidence.** Parol evidence is not admissible, in an action at law, to vary or change the effect of negotiable instruments; so that, in an action at law on a promissory note, parol evidence that the maker had, through mistake, signed a note so as to bind himself individually, instead of signing in a representative capacity, so as to bind his principal, was inadmissible.

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6. ———: **Mistake in Signature: Liability of Maker.** Where promissory notes, given for goods purchased by a corporation, were signed by the corporation by its president, followed by the signature of another person, with no official designation whatever, the latter signer was liable thereon to the payee, under Sec. 9991, R. S. 1909, although she was, in fact, the secretary of the corporation.

7. ———: ———: ———. Where promissory notes, given for goods purchased by a corporation, were signed by its president as an individual, and by another with the word "Secy." affixed to her name, the notes containing no other reference to the corporation, the latter signer was liable thereon to the payee, under Sec. 9991, R. S. 1909, although she was, in fact, the secretary of the corporation.

8. **COURTS: Bills and Notes: Rules of Decision.** Settled rules of law, governing commercial paper, cannot be set aside because their application in a particular case will result in hardship.

Appeal from St. Louis City Circuit Court.—*Hon. Leo S. Rassieur,* Judge.

AFFIRMED.

Chester H. Krum for appellant.

(1) The notes sued on were wholly without consideration passing to appellant. (a) Absence of consideration is a matter of defense as against any person not a holder in due course. Rev. Stat., sec. 9999. (b) Respondent was not a holder in due course—the notes never having been negotiated. (c) The court expressly found that no consideration passed to appellant. The situation upon the record is that appellant was secretary of a corporation for which she signed the notes sued on, as such secretary. This was the case, even where she signed without her official character being named. The defense she interposed was clearly within the statute and should have been sustained. (2) The finding below cannot be sustained upon some hypothesis of accommodation. (a) Appellant was not an accommodation maker. She mistakenly signed without indicating in what capacity she signed. (b) It is impossible to distinguish the case, in principle, from Chicago, Etc., Co. v. Brady, 165 Mo. 197, 205.

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Charles A. Houts for respondent.

(1) The evidence showed, and the court found, that the notes sued on were for the purchase price of pianos sold to the International Electric Piano Company. The pianos were consideration for the notes. (2) The court properly refused to allow defendant to show that she signed the notes as an officer of the corporation, not intending to bind herself personally, because: (a) There was no testimony that any such intention was communicated to the plaintiff. (b) As to the first two notes, nothing appeared on the face of the notes to indicate that she signed as an officer of the corporation, nor was there any ambiguity as to her relationship to these two notes. Myers v. Chesley, 177 S. W. 326; Mineral Belt Bank v. Zinc Company, 173 Mo. App. 634. (c) As to the remaining notes, the name of the corporation nowhere appeared, so that it could not be held; and the addition of the word "Sec'y" to defendant's name was simply *descriptio personae,* and did not relieve her from liability. Negotiable Instrument Act, secs. 9989-9991, R. S. 1909; Myers v. Chesley, 177 S. W. 326; Mineral Belt Bank v. Zinc Company, 173 Mo. App. 634; Bigelow on Bills and Notes, pages 30 and 31; Norton on Bills and Notes, page 66; Ogden on Negotiable Instruments, page 26; Bunker on Negotiable Instruments, pages 65 and 66; Calvert's Daniel on Negotiable Instruments, sec. 305; Studebaker Mfg. Co. v. Montgomery, 74 Mo. 101; Sparks v. Dispatch Transfer Co., 104 Mo. 531; San Bernardino Nat'l Bank v. Anderson, 32 Pac. 168 (Cal.); Davis v. England, 141 Mass. 587; Keokuk Falls Improvement Co. v. Kingsland, 47 Pac. 484 (Okla.); Mellon v. Moore, 68 Me. 390; Kohrs v. Smith, 45 Mont. 467. (3) The defendant did not include in her motion for a new trial as a ground for a new trial the alleged error of the court in excluding testimony that she signed the notes as an officer of the company, not intending to bind herself personally; hence, on the record, she cannot now avail herself of this defense. (4) The court properly allowed a reason-

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able attorney's fee, as provided in the first two notes. Ogden on Negotiable Instruments, pages 409-411; Bank v. Sutton Mfg. Co., 57 Feb. 191.

STATEMENT.—This action was brought against the appellant on nine promissory notes. The first and second are of date September 8, 1909, each for $60. After the date they read:

"Eleven months after date, for value received, I promise to pay to the order of the Rudolph Wurlitzer Company sixty dollars, payable ——at——with interest thereon from date at the rate of 6 per cent. per annum, with exchange at the current rate and with cost of collection and an attorney's fee in case payments shall not be made at maturity."

Following this and in the first person singular is a clause waiving the benefit of all exemption laws and authorizing any attorney at law to appear in any court of record "for me" in any action on the note, and waiving issue of service and confessing judgment, etc. This is signed,

"INTERNATIONAL ELECTRIC PIANO CO.,
M. D. GROSS, Pres.
TEKLA ROSSMANN."

Of the remaining notes, six of them for $50 each, and one for $20, all dated February 4, 1910, after the date read:

"Six months after date we promise to pay to the Rudolph Wurlitzer Company or order $50, for value received, with interest from February 4, 1910, at the rate of 6 per cent. per annum until paid, and we agree to pay same at 912 Pine Street."

Each of them is signed,

"M. D. GROSS,
TEKLA ROSSMANN, Secy."

The petition counting on these nine notes, prays for judgment for the amount of them and interest, as also for attorney's fees as to the first and second.

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The answer, after a general denial, and taking up each note in a separate paragraph, sets out as to the two notes for $60 each, that appellant Rossmann, on or before September 8, 1909, was secretary of the International Electric Piano Company, a corporation having its office in the city of St. Louis, incorporated under the laws of this State, and engaged in selling electric pianos and piano players; that on September 8, that corporation was selling almost exclusively the electric pianos made by plaintiff, it buying all of them from it; that the notes sued on are wholly and entirely without any consideration and therefore not binding on this defendant; that on September 8, the date upon which the first two notes were executed, the International Electric Piano Company, in the ordinary course of business, bought a number of pianos from the plaintiff and gave to plaintiff a chattel mortgage and its notes as security for the purchase price of the pianos, and that these two sixty-dollar notes are notes of the International Electric Piano Company given for the purposes aforesaid, and that they were signed by defendant (appellant here) as an officer of that company, and in the ordinary course of business of that company, by authority and direction of the company and as and for an obligation of the company, intending thereby to bind the company only, all of which facts were known to plaintiff, as is alleged, and done by and with the consent of plaintiff and accepted by plaintiff as the note and obligation of the International Electric Piano Company.

It is further averred that her signatures on the notes are not her individual signatures but her signatures as an officer of the International Electric Piano Company and as and for the obligation of that company, and that no consideration moved to her for signing the notes. Further answering defendant states, on information and belief, that the plaintiff foreclosed on the chattel mortgage referred to, and in pursuance of this foreclosure sold the pianos and that the proceeds of the sale were sufficient and fully paid and satisfied the notes. Averring that no

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notice of protest or dishonor of these notes had ever been given defendant, she prays that she be discharged from the action with her costs.

The answer as to the remaining notes is practically identical in its averments with the foregoing, save as to the change necessary by the difference in the date, all these latter notes being dated February 4, 1910.

It does not appear that any reply was filed but the case was treated as being at issue on the petition and answer. A jury was waived and the cause heard before the court, the notes referred to being offered in evidence, without any objection.

It was admitted that the six fifty-dollar notes and the twenty-dollar note were secured by chattel mortgages executed by the International Electric Piano Company to plaintiff, on a piano bought by the former company from the latter, and that from the selling price of the piano the plaintiff received the sum of $230 on November 2, 1912. The mortgage referred to was offered in evidence but is not in the abstract. There was evidence as to the value of the services of the attorney in bringing the action, and plaintiff rested.

Defendant in her own behalf offered the record of the voluntary assignment of the International Electric Piano Company, in the proceedings under which the plaintiff had presented for allowance all the notes referred to except the first and second. This was objected to but the objection overruled. This record is not in the abstract before us, and we have no evidence of its contents or scope, other than above. The two chattel mortgages referred to were also introduced but they are not before us; how and by what officers executed does not appear; it is stated, however, that they covered all the notes except the two for $60 each.

Defendant thereupon took the stand as a witness in her own behalf and stated that her connection with the International Electric Piano Company on September 8, 1909, and February 4, 1910, as well as before, between and after those dates, was that of secretary; that she never had any dealings personally with plaintiff and

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did not personally buy any pianos from it and never owed plaintiff company anything. Admitting her signatures to the notes as signed, she testified that she never received anything personally, and she added that she had signed these notes as an officer of the company. This latter was objected to on the ground that the notes spoke for themselves. The objection was sustained, defendant excepting. Defendant repeating that she never received anything personally for the notes and was never obligated in any way to the plaintiff, stated that she had signed the chattel mortgage at the same time she had signed the notes; that when she signed these notes and when they were received by the plaintiff company, that company knew that she was an officer of the International Electric Piano Company; that that fact had been known to them for years. She further testified that the plaintiff company had been doing business with the International Electric Piano Company, certainly since 1906, possibly earlier. She was then asked: "Can you state to the court the procedure that was followed when the International Electric Piano Company bought pianos from the Rudolph Wurlitzer Company?" The court said: "Is not that an effort to change the terms of this written contract?" To which counsel for defendant said that they maintained, "that in a note, as between the original parties, where the payee of the note knew the capacity in which the defendant in this case was signing and accepted it with that knowledge—" The court: "Is not this changing the terms of that written contract? If the contract incorrectly recites what has taken place is not your remedy to reform it?" The court, however, announced that it would hear the testimony subject to the objection of counsel for defendant. Witness then answered: "The pianos have been secured by a mortgage given by the International Electric Piano Company and notes given in payment, and those notes payable different months and at different times and signed by the officers of the company." Plaintiff, then asked if the notes were ever presented to her for payment be-

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fore the winding up of the business of the International Electric Piano Company, answered, "No;" that she had never been asked to pay these notes. This was her testimony in chief.

On cross-examination defendant admitted that payment had been demanded of her on the notes before the action was commenced; that at the time of the execution of the notes one Unger was manager of the business of the International Electric Piano Company and that she (defendant) had nothing to do with the active business of the concern; that Unger had presented the notes to her for signature and that she had never had any communication personally with plaintiff. The court asked her if these notes involved had not been given in payment of the merchandise received. Witness answered that the merchandise had been received by the company but not by her, and that all she ever learned with respect to the transactions was from some of the employees of the International Electric Piano Company, of which company Mr. Gross was president. The defendant, still on the stand as a witness, stated that she would like to show under what conditions she signed these particular notes. That was objected to and objection sustained. No exception to this ruling is noted.

Mr. Gross testified that he had been president of the International Electric Piano Company in 1909 and 1910. Shown the notes and asked under what circumstances they were signed, he answered that they were signed by himself and the defendant as officers of the company. This was objected to, but no ruling made. He was then asked to state the circumstances under which the notes had been signed and who asked him to sign. That was objected to but no ruling made nor answer given. He was then asked what the notes were given for and he answered that they had been given for pianos bought from the Rudolph Wurlitzer Company by the International Electric Piano Company; that at the time he was president and the defendant secretary

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of the company. Asked if he knew whether Mrs. Rossmann, the defendant, had received any money or goods or any consideration for the signing of the notes, he said he did not know. This was the substance of all the testimony in the case.

The trial judge thereupon taking the case under advisement rendered a finding of facts not necessary to set out, it being sufficient to say that, in effect, he found that defendant was bound individually on the notes, that the consideration for the notes was the piano purchased by the International Electric Piano Company, that the notes were entitled to a credit of $230, and allowing $50 for an attorney's fee on the first and second notes, he rendered judgment in favor of plaintiff in the sum of $351.64.

Defendant in due time filed a motion for new trial, assigning four grounds: First, the verdict and judgment of the court is against the evidence and the weight of the evidence; second, is against the law under the evidence; third, is against the law and the evidence; fourth, in failing to give findings of fact requested by defendant. The motion for new trial being overruled, the plaintiff excepting, duly appealed to our court.

REYNOLDS, P. J. (after stating the facts).—It will be noticed that there is no complaint made in this motion as to the exclusion of evidence, nor does the requested finding appear. Learned counsel for appellant in his brief makes two points for reversal and we confine ourselves to them.

His first point is, that the notes were wholly without consideration, arguing that absence of consideration is a matter of defense as against any person not a holder in due course, and citing section 9999, Revised Statutes 1909, in support of this proposition. That section provides that absence or failure of consideration is a matter of defense as against any person not a holder in due course. It is also argued under this first point that respondent was not a holder in due course, the notes never having been negotiated, and it is stated

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that the court expressly found that no consideration passed to appellant. Disposing of this last proposition, it is sufficient to say that the court found there was consideration for the notes.

Taking up the remainder of the point, while it is true that no consideration passed personally to appellant, it is abundantly clear that there was a consideration for the notes as between the two companies; in point of fact, every count of the answer admitted there was a consideration for the notes, it being averred that they were given for a piano purchased from plaintiff by the International Electric Piano Company. That the consideration did not pass to the plaintiff herself is entirely immaterial. It is hornbook law that if A purchases goods from B, for which he does not immediately pay, and that C and D give their note to B for A's debt, the consideration between A and B is sufficient to support the note of C and D given to B on that consideration. We are therefore unable to agree with the proposition of learned counsel, that the defense interposed was clearly within the statute referred to and hence should have been sustained.

The second point argued by learned counsel for appellant is that the finding below cannot be sustained upon some hypothesis of accommodation, because: first, appellant was not an accommodation maker but had "mistakenly signed without indicating in what capacity she signed;" and, second, that it is impossible to distinguish the case in principle from that of Chicago Title & Trust Co. v. Brady, 165 Mo. 197, l. c. 205, 65 S. W. 303. It is also argued under this point by learned counsel for appellant that she had "signed the note as the company's note. She omitted the proof of that fact from the face of the paper. This is all that can be figured out of the case."

Admitting that plaintiff had "mistakenly signed without indicating in what capacity she signed," that mistake is to her own hurt and cannot avail her in this action. Mistakes of fact may be relieved in a

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court of equity, but are not cognizable by a court of law in a purely legal action. So the learned trial judge intimated; that is, if appellant had brought an action for the reformation of the notes, they still being in the hands of the original party, or of one having notice, that action might have been maintained. But she did not do that and attempted in this proceeding to vary the written contract by parol, a thing she could not do. The fact here admitted by her counsel, that appellant "had omitted proof of that fact (of her representative capacity) from the face of the paper," is fatal in this action.

There have been decisions in which it seems to have been held that a party signing a note and attaching to his signature the designation of an office he holds, cannot be held personally. But when the decisions of our own State are examined, which are claimed to so hold, it will be found that there was something in the body of the instrument itself or in the manner of the signature, to allow evidence to be introduced to explain the apparent ambiguity.

The last decision of our Supreme Court treating of this, to which our attention has been called, is that of Spark et al. v. The Dispatch Transfer Co., 104 Mo. 531, 13 S. W. 417. There Judge GANTT, who wrote the opinion, has carefully reviewed the authorities which are claimed to throw any light upon the point, not only in our own State but by text-writers and courts, both of the United States and of other courts. Even in that case, with all the decisions of our Supreme Court before him on questions at all germane to the question, Judge GANTT has said (l. c. 541), that the exact question presented there, that is, the liability of the defendant company on the notes signed by its president in his own name and without any reference to the corporation in the body or in the signature, had not been passed on by our Supreme Court. The Sparks case, supra, was an action upon given notes, two of them ordinary promissory notes, payable at a day named and for value received, signed "Dispatch Transfer Co., by S. Jack-

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son, President." The remaining three notes were in the ordinary form of negotiable promissory notes and signed, "S. Jackson." The plaintiff Sparks and others sued the Dispatch Transfer Company on these notes. The jury returned a verdict in favor of the plaintiff on all of them. Parol evidence was admitted at the trial to show that the defendant corporation was liable on the three notes signed by its president in his individual name without any reference in the notes themselves or in the signatures to any official character, there being evidence, however, to the effect that the mules, for the purchase of which these notes had been given, were purchased for the use of the defendant company. Judge GANTT, after stating that the precise point was new in our State, as above noted, says that it has been long settled in many of our sister States, citing a number of decisions. He refers to and quotes from Pentz v. Stanton, 10 Wend. 271, as carrying the conclusion arrived at upon the examination of authorities in England and in the different States of the Union (l. c. 542) as being to the effect "that no person can be considered a party to a bill, unless his name, or the name of the firm of which he is a partner, appears on some part of it." He states this as a rule universally accepted as law by recent text-writers, referring to them, and designates paper which contain no such indicium and is signed in that way as, "'a courier without luggage,' whose countenance is its passport; and, in suits upon negotiable instruments, no evidence is admissible to charge any person as a principal thereto, unless his name in some way is disclosed upon the instrument itself." Judge GANTT adds: "And another good reason for the rule is, that every part of commercial paper must be definite and certain and contained in the body of the paper itself, so that every taker and holder understands exactly what his rights in and to it are, and with whom he is contracting." Judge GANTT further approvingly quotes from Mechanics'

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Bank of Alexandria v. Bank of Columbia, 5 Wheaton 326, l. c. 336, this: "But the fact that this appeared on its face to be a private check, is by no means to be conceded. On the contrary, the appearance of the corporate name of the institution on the face of the paper, at once leads to the belief that it is a corporate, and not an individual, transaction; to which must be added the circumstances that the cashier is the drawer, and the teller the payee; and the form of ordinary checks deviated from the substitution of *to order,* for *to bearer.* The evidence, therefore, on the face of the bill, predominates in favor of its being a bank transaction." The conclusion of our Supreme Court in the Sparks case, supra (l. c. 548), is to the effect that in view of the law, the trial court erred in the admission of parol evidence to show that Jackson executed three of the notes sued on as notes of the corporation.

That case is the converse of the one before us, but its principle is here applicable. While it was decided before the adoption in 1905 of our Negotiable Instrument Law, chap. 86, Revised Statutes 1909, we think it is in entire harmony with what is now section 9991, Revised Statutes 1909, a section in that law.

By that section it is provided:

"Where the instrument contains or a person adds to his signature words indicating that he signs for or on behalf of a principal or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as agent, or as filling a representative character, without disclosing his principal, does not exempt him from personal liability."

In our judgment this section is conclusive of the proposition here involved.

While on the first two notes the name of the International Electric Piano Company appears, followed by the signature, "M. D. Gross, Pres.," the signature of appellant following has no official designation

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whatsoever and in the remaining notes no reference whatever to any corporation appears; they are ordinary promissory notes, signed, "M. D. Gross, Tekla Rossmann, Secy." Clearly on the two first notes appellant signed and is bound individually. We know of no rule which prevents an individual signing a note as maker with a corporation. That is exactly what this appellant did as to the two first notes. In the remaining seven notes the word or abbreviation "Secy.," appears, but the name of the International Electric Piano Company nowhere appears either as a party or signatory.

We are aware that there has been some diversity of opinion even since the enactment of this statute among some of the courts of States in which the Negotiable Instrument Law has been adopted, as to the proper construction of this provision; those decisions adhering to older decisions. But as we had occasion to say in Walker v. Dunham et al., 135 Mo. App. 396, 115 S. W. 1086, when our State, as the result of efforts made by the members of the American Bar Association, and following many other States, adopted the Negotiable Instrument Act, the very purpose of that act was to harmonize the law and to establish uniformity of law throughout the several States of the Union on the subject of negotiable instruments. It would avail very little for our legislative branch of the government to attempt, by legislation, to adopt a uniform system of laws on any subject and for the judicial department—the courts—to depart as widely as ever from each other as before, in construing the same provision in that law. Such a course certainly does not tend to the promotion of harmony and uniformity throughout the Union on a matter of so great importance as that involved in the construction of negotiable instruments.

The only decisions by any of our appellate courts on the point here involved, rendered since the adoption of our Negotiable Instrument Law, and on notes

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falling under it, are Stephenson v. Joplin State Bank, 160 Mo. App. 47, 141 S. W. 691, and Myers v. Chesley, 190 Mo. App. 371, 177 S. W. 326, decisions rendered by the Springfield Court of Appeals. In both these decisions we think that that learned body recognized the law to be as we here hold. In the Myers case, supra, the note was held, and we think, correctly, to fall within section 9991 of our Negotiable Instrument Act. In the very note there involved it appeared on its face that the defendant there had signed "for or on behalf of a (named) principal or in a representative capacity." Each of these decisions is in line with that of Sparks v. Dispatch Transfer Co., supra, and with what we here hold.

We hold, therefore, that the learned trial court committed no error in excluding the parol evidence which was offered to vary and counteract the plain provisions of these several notes.

Learned counsel for appellant has himself stated that appellant was not an accommodation maker but that she "mistakenly signed without indicating in what capacity she signed." Her mistake is one of which she must herself suffer the consequences, unfortunate as they may be for her.

When that counsel, however, asserts under the second subdivision of his second point, that it is impossible to distinguish the case at bar in principle from that of Chicago Title & Trust Co. v. Brady, 165 Mo. 197, and referring, as he does, especially, to page 205, we are unable to agree with him. That was a case in which there was no consideration whatever. For the purpose of swelling the apparent assets of the bank, of which they were officers, Brady and another officer executed their notes to the bank. The bank subsequently becoming insolvent and going into the hands of a receiver, that receiver, the Chicago Title & Trust Company, sued Brady upon the notes. It was very properly held there, not only by reason of this being an accommodation paper, but because there was no consideration whatever to anyone, that the receiver could

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have no higher title in the paper than the corporation it represented; could not recover as against the defendant. That is very far from the case at bar, for here, contrary to the assertion of the learned counsel for appellant, the trial court did find as a fact and as we have before set out, that there was a consideration for the note here given; not moving, it is true, immediately to the defendant, here a party to the note, but to the corporation; and so the appellant herself pleaded.

This is probably a hard case on appellant, but we, as a court, cannot disregard or set aside rules which must be applied in the construction of commercial paper by the seeming hardness of a particular case.

Without going further into the case our conclusion is that the judgment of the trial court is correct and it is accordingly affirmed. *Allen, J.*, concurs.

BENEDETTO STOBILE, Respondent, v. JOHN F. McMAHON, Appellant.

St. Louis Court of Appeals, November 6, 1916.

1. **MASTER AND SERVANT: Injury to Servant: Res Ipsa Loquitur.** The *res ipsa loquitur* doctrine does not apply in an action by a servant for injuries sustained by reason of the master's negligence in furnishing him an unsafe place in which to work.

2. ———: ———: ———: **Sufficiency of Petition: Petition Construed.** In an action by a servant for personal injuries, the petition alleged that defendant's foreman negligently allowed plaintiff's working place to become unsafe and dangerous by permitting a hoisting engine to be operated over plaintiff while he was performing work which he had been ordered by the foreman to do. *Held*, that the petition counts upon the theory that defendant failed to exericse ordinary care to furnish plaintiff a reasonably safe place in which to work, and does not invoke the *res ipsa loquitur* doctrine. *Held, further*, that the petition states a cause of action.

3. ———: **Safe Place to Work: Duty of Master.** It is not only the duty of the master to exercise ordinary care to furnish the servant a reasonably safe place in which to work, but to keep it reasonably safe for him to perform the labor required of him.

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4. **DAMAGES: Inability to Work: Admissibility of Evidence.** In an action for personal injuries, evidence tending to show that plaintiff had not been working and had not been able to work since receiving his injuries, was admissible for the purpose of showing the permanency and extent of his injury and disability, notwithstanding the petition did not claim damages for loss of earnings; and the fact that the instruction on the measure of damages did not permit a recovery for loss of earnings shows that it was admitted for the purpose above stated only.

5. **EVIDENCE: Expert Testimony: Opinions: Conclusions.** In an action for personal injuries, evidence by a physician that, in his opinion, plaintiff would not be able to do heavy lifting or to perform heavy work as he could before he was injured, was admissible as expert testimony, and was not objectionable as being the statement of a mere conclusion.

6. **MASTER AND SERVANT: Injury to Servant: Instructions.** In an action by a servant for personal injuries, the petition alleged that defendant's foreman negligently allowed plaintiff's working place to become unsafe and dangerous by permitting a hoisting engine to be operated over plaintiff while he was performing work which he had been ordered by the foreman to do. An instruction for plaintiff permitted a recovery if defendant negligently allowed the place in which plaintiff was working to become dangerous, by "negligently allowing the hoisting machine *and bucket* to be operated near plaintiff." *Held*, that the instruction was not erroneous as broadening the allegations of the petition, by adding the words "and bucket" to the words "hoisting machine," since the "hoisting machine" described in the petition was composed of a cable and bucket operated by the engine.

7. **INSTRUCTIONS: Applicability to Issue.** Instructions permitting a recovery should not be broader than the allegations of the petition.

8. **MASTER AND SERVANT: Injury to Servant: Safe Place to Work: Instructions: Error Cured by Other Instructions.** In an action by a servant for personal injuries, the error in an instruction, which did not purport to cover the entire case and authorize a verdict for plaintiff, but merely dealt with the question of assumption of the risk, "that the law required defendant not only to furnish a reasonably safe place to work, but also required him to keep it so," instead of merely requiring defendant to exercise ordinary care to that end, was cured by the latter part of the instruction, which applied the instruction to the facts of the case and charged that if the jury found that the defendant's foreman neglected (that is, failed to exercise ordinary care) to adopt suitable precautions for plaintiff's protection to keep his place of work reasonably safe, and plaintiff was injured as a result of such neglect (that is, failure to exercise ordinary care), plaintiff did not assume the risk of such injury.

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Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher,* Judge.

AFFIRMED.

R. M. Sheppard and *J. P. McCammon* for appellant.

(1) This is not a case in which the doctrine of *res ipsa loquitur* applies. Therefore it was incumbent upon the plaintiff to allege and prove some act of negligence upon the part of the defendant. The charge in the petition is that the defendant negligently and carelessly allowed and permitted a hoisting machine to be operated near plaintiff with same and breaking mangling and crushing plaintiff's leg, without alleging any fact or facts from which the court could say as a matter of law that it was negligence to have operated the machine at the time and under the circumstances. Removich v. Bambrick Bros. Const. Co., 173 S. W. 686; Oglesby v. Railroad, 177 Mo. 272; Fuchs v. St. Louis, 167 Mo. 620; Beeve v. Transit Co., 206 Mo. 419; Howard v. Railroad, 173 Mo. 530; Hamilton v. Railroad, 123 Mo. App., 627; Good v. Coal Company, 167 Mo. App. 175; 26 Cyc. 1411. (2) The evidence in this case merely shows that the plaintiff was in the employ of the defendant, and while in the employ of the defendant received an injury, without showing any negligence whatsoever upon the part of the defendant. The mere fact of an accident and the consequent injury resulting therefrom does not, as a rule, make out a prima-facie case. There are cases in which the doctrine of *res ipsa loquitur* applies, but that doctrine does not apply and cannot apply to the facts in this case. See cases under point 1; 26 Cyc. 1411. (3) Loss of time is a species of special damages, and in order to recover for the loss of time, it is necessary to make this an issue by a proper and sufficient allegation in the petition. There is no allegation whatever in this petition that plaintiff, by reason of his alleged injury, had suffered any loss of time or would in the future

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suffer any loss of time by reason of such injury. Therefore the court committed error in permitting the plaintiff to show, over the objections and exceptions of the defendant, that he had not done any work and that his inability to do work was because of his injury, and in offering expert evidence to the effect that plaintiff's injury was such that he would not be able to continuously do hard labor. Campbell v. Chillicothe, 175 Mo. App. 439; Hitchings v. Maryville, 134 Mo. App. 716; Keen v. Railroad, 129 Mo. App. 301; Zougker v. Peoples Union Mercantile Co., 110 Mo. App 382. (4) It is the province of an expert witness, testifying upon a question which calls for expert evidence, to state his opinion, and not to give a statement of a positive fact or his conclusion. The physician who had examined the plaintiff should not have been permitted to answer a question which called for a statement of a positive fact as to whether or not the plaintiff in the future would be able to do hard labor. This was a question which the jury was called to try and determine. It is well settled in this State that a question and answer of this character does not call for the expression of an opinion but a conclusion of the witness, calling upon the witness to state an ultimate fact which the jury is called to try and determine. Holtzen v. Railroad, 159 Mo. App. 374; Thomas v. Met. Street Ry. Co., 125 Mo. App. 131; Glasgow v. Railroad, 119 Mo. 347; Taylor v. Railroad, 185 Mo. Mo. 239; Roscoe v. Met. Street Ry. Co., 202 Mo. 594; Lutz v. Met. Street Railway, 123 Mo. App. 499; Spaulding v. Edina, 122 Mo. App. 64; State v. Hyde, 136 S. W. 331-332. (5) The court committed error in giving instruction number 1 given at the request of the plaintiff. The charge in the petition was that the defendant permitted plaintiff's place to work to become unsafe and dangerous by negligently and carelessly allowing a hoisting machine to be operated near plaintiff, thereby striking plaintiff with same and breaking, mangling and crushing plaintiff's leg. Instruction number 1 broadened the issues by adding to the charge

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in the petition, "by negligently and carelessly allowing the hoisting machine and bucket to be operated on said dump near plaintiff." It is a well settled principle of law in this State that the instructions should not be broader than the petition and should not enlarge the issues presented by the petition. Sinnamon v. Moore, 161 Mo. App. 178; Black v. Railroad, 217 Mo. 685; Craton v. Huntzinger, 163 Mo. App. 721; Orcutt v. Century Bldg. Co., 201 Mo. 424; Maynard v. Railroad, 135 Mo. App. 352; Lowenstein v. Railroad, 110 Mo. App. 686; Smart v. Railroad, 164 Mo. App. 68; Salmon v. Railroad, 181 Mo. App. 414; Scrivner v. Railroad, 169 S. W. 83; St. Louis v. Kansas City, 110 Mo. App. 655. (6) The law imposes upon the master the duty and obligation to exercise ordinary care to furnish his employees a reasonably safe place in which to work, and to exercise ordinary care to keep the same reasonably safe. Instruction number 2 was erroneous in that it told the jury that the plaintiff, in working for the defendant, assumed only the risks ordinarily and usually belonging to the business after defendant had done what the law required of him, and then asserting the positive statement "that the law required the defendant not only to furnish plaintiff a reasonably safe place to work; but also required him to keep it so." It thus imposed upon the defendant the absolute duty of furnishing a place which was reasonably safe, whereas the duty imposed upon the defendant was to exercise ordinary care to furnish plaintiff a reasonably safe place in which to work and to exercise ordinary care to keep it reasonably safe. Pruett v. Campbell Lumber Co., 174 S. W. 164; Haas v. Car & Foundry Co., 176 Mo. App. 326; Glasscock v. Swafford Bros. Dry Goods Co., 106 Mo. App. 657; Hach v. Railroad, 117 Mo. App. 11; 26 Cyc. paragraph 2, page 1106; Bradley v. Railroad, 138 Mo. 293; Miles v. Coal & Coke Co., 172 Mo. App. 238; Britt v. Crebo, 172 Mo. App. 435; Sager v. Mining Co., 178 Mo. App. 511.

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Charles P. Comer for respondent.

(1) The petition states a cause of action, based on the non-delegable duty of the master to exercise ordinary care in maintaining a reasonably safe place for the servant to work. Koerner v. St. Louis Car Co., 107 S. W. 481, 209 Mo. 141; Bradly v. Railroad, 138 Mo. 293, 39 S. W. 764; Benedict v. Railroad, 104 Mo. App. 218, 78 S. W. 61. (2) The evidence shows that the plaintiff, while in the employ of the defendant, was ordered to perform work in a certain place and, while obeying said order, the defendant's foreman in charge of the work, negligently and carelessly allowed the plaintiff's place to work to become unsafe and dangerous, thereby injuring plaintiff. There is no attempt to allege or prove a case of *res ipsa loquitur*. (3) There is no claim for loss of time or wages in the plaintiff's petition and no attempt was made to prove loss of time or wages. The petition alleges, plaintiff has, does and will ever suffer great physical and mental pain and bodily weakness and has been permanently injured. Evidence was tendered to show physical ability to perform hard labor before the injury and physical disability to perform hard labor after the injury in support of said allegation of physical and bodily weakness and permanent injury. (4) It is proper expert testimony for a qualified physician to give his opinion as to whether or not an injured leg is of sufficient strength to bear the weight of plaintiff's body to perform hard labor. (5) Where the petition alleges negligence in allowing a hoisting machine to be operated near plaintiff, said hoisting machine being composed of a cable and a bucket, an instruction reading "Negligently allowing the hoisting machine and bucket to be operated on said dump near plaintiff," does not broaden the issues and could not possibly mislead the jury, as the bucket is part of the hoisting machine. (6) Plaintiff's instruction number 2, on the assumption of risk, was not erroneous in defining defendant's risk liability, when it broadly stated the duty of master toward the servant and fol-

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lowed same with a specific application to the facts of this particular case as to assumption of risk and did not attempt to lay down the question of defendant's liability, which had already been covered in plaintiff's instruction number 1.

THOMPSON, J.—This is an action for damages for personal injuries. The plaintiff secured a verdict and judgment in the trial court. A motion for a new trial was filed by defendant, which was overruled by the court, and he appealed.

The petition in the case was as follows:

"Plaintiff states that on or about the —— day of March, 1913, he was in the employ of the defendant, and while pursuing the duties of such employment defendant's foreman in charge of and directing plaintiff's work ordered plaintiff to assist in removing a large timber from one place to another. That while plaintiff was obeying said order defendant's foreman negligently allowed plaintiff's place to work to become unsafe and dangerous, in that said foreman negligently and carelessly, and in disregard of plaintiff's safety allowed and permitted a hoisting machine to be operated near plaintiff, thereby striking plaintiff with same and breaking, mangling and crushing plaintiff's leg. Plaintiff states that as a result of said negligence and injury plaintiff has, does and will ever suffer great physical and mental pain and bodily weakness and has been permanently injured. That as a result of said negligence and injury plaintiff has, does and will ever expend large sums of money and incur indebtedness in and about the treatment of said injuries, suffering and weakness."

The answer was a general denial and a plea of assumption of risk.

The evidence tended to show that, during the month of March, 1913, when the plaintiff was injured, the defendant was engaged in constructing a sewer in the northwest part of the city of St. Louis. At the time of the injury, defendant and his men were engaged in

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the digging of a ditch one hundred and thirty or one hundred and forty feet long and some seventeen feet wide. At one end of this ditch was an engine, which furnished the power for a hoisting machine composed of a cable and bucket. This cable extended over the ditch from the end where the engine was placed to a point near the other end of the ditch where the excavating was being done. The dirt was taken from the ditch by means of a bucket which was attached to the end of the cable and which upon being filled was hoisted out of the ditch and thence backward towards the engine where the bucket would be lowered and dumped. This dump, at the time of the accident involved in this case, was about fifteen feet high and seventeen or eighteen feet wide and forty or fifty feet long, and was narrower at the top and sloped to the bottom. The dirt from the ditch was brought back along the cable in the bucket, as aforesaid. When the bucket was over that part of the dump where it was to be emptied it was lowered to the top of the dump where a man located for that purpose would trip the bucket—that is, with a stick would knock loose a catch on the side of the bucket so that it would turn upside down and the dirt would fall from the bucket on top of the dump. Occasionally when the bucket had been tripped by the man on top of the dump all of the earth therein would not come out of the bucket, and on those occasions it would be dragged or jolted along the top of the dump in order to shake out of it the remaining earth or dirt.

The evidence showed that the operation of the hoisting machine, which was composed of the cable and bucket, was guided by a man, known as a signal man, who stood at one side of the ditch and with an electric button signaled the engineer. A signal would be given by this man to the engineer when the bucket was filled in the ditch and ready for hoisting. After the bucket was hoisted, another signal would be given by this man to the engineer, to draw in the bucket over the dump, and then when the bucket had reached the

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right spot on the dump, the signal man would signal to the engineer to lower the bucket where it was dumped.

On the day of the accident, the plaintiff was working in that part of the ditch where the dirt was being hoisted out by means of the hoisting machine and bucket. The defendant had in charge of the work a foreman. This foreman ordered the plaintiff and another man to come up out of the ditch and go to the place where this earth was being dumped and take some timbers away from the foot of the dump. While the plaintiff and the other laborer were obeying the order of the foreman, and while working at the foot of the dump in removing these timbers, which were partially covered by dirt of the dump, the hoisting machine was kept operated, and upon the bucket being lowered to the top of the dump, and after it was tripped by the man on top of the dump, and while it was being dragged along on top of the dump for the purpose of jolting out the remaining earth therein, it rolled down the side of the dump and struck the plaintiff, breaking his leg in three places between the knee and ankle, and for this and other injuries received by being struck by the bucket the plaintiff brings this suit.

Defendant's foreman and defendant's signal man, above referred to, at the time the foreman gave the order mentioned above to the plaintiff to remove the timbers, were standing close together on top of the ground right over the excavation where plaintiff was working.

The foreman who gave the order above mentioned, testified:

"The machinery was in good working order, the bell system was in good order, the signal man did obey his orders; that when he ordered these men to go in and get those timbers out of the dump he did not tell the signal man not to operate the bucket while they were getting them out and that it was a mistake to do it that way; that he didn't say anything to any-

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body about not operating the bucket while those men were in there."

The man who was working on top of the dump, whose business it was to trip the bucket and let out the dirt, testified as follows:

"I had been working on the dump two months. John (meaning the plaintiff) had come up there to get the timbers before. He sent John, generally, or somebody else, most every day. At any time before, when John came up there after timbers, the bucket was never dumped up over him. . . . They always waited until the man got away from the bottom of the dump before they dumped the bucket and started it back."

At the instance and request of the plaintiff, the court gave the following instructions:

"INSTRUCTION No. 1.

"The court instructs the jury that if you find and believe from the evidence that on or about the —— day of March, 1913, the plaintiff was in the employ of the defendant, and while pursuing the duties of such employment, defendant's foreman in charge of and directing plaintiff's work, ordered plaintiff to assist in removing timbers from the foot of the dump mentioned in the evidence, and that while plaintiff was obeying such order, defendant's foreman negligently allowed plaintiff's place to work, in removing said timbers, to become unsafe and dangerous by negligently and carelessly allowing the hoisting machine and bucket to be operated on said dump near plaintiff, thereby striking plaintiff and injuring him with same, then your verdict should be for the plaintiff, unless you further find and believe the risk of such danger and injury was one assumed by plaintiff, as hereinafter explained in other instructions."

"INSTRUCTION No. 2.

"The court instructs the jury that the plaintiff in working for the defendant assumed only the risks ordinarily and usually belonging to the business, after defendant had done what the law required of him.

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The law required the defendant not only to furnish plaintiff a reasonably safe place to work, but also required him to keep it so, and if you find and believe from the evidence that defendant's foreman allowed a hoisting machine to be operated near plaintiff while removing said timbers, thereby injuring plaintiff, and that in so doing said foreman neglected to adopt suitable precautions for plaintiff's protection, to keep the plaintiff's place to work reasonably safe, and the plaintiff was injured as a result of such neglect, the plaintiff did not assume the risk of such injury."

POINT I.

The appellant insists that the trial court erred in allowing any evidence to be introduced under the petition, on the ground that it does not state facts sufficient to constitute a cause of action against the defendant. The appellant's argument upon this point is based on the idea that the petition is drawn on the theory that the doctrine of *res ipsa loquitur* applied in the case and that the doctrine does not apply in this sort of a case, and cites many authorities supporting the proposition that the doctrine of *res ipsa loquitur* does not apply in this case. We fully agree with the learned counsel that the doctrine of *res ipsa loquitur* cannot be invoked in this case, but the counsel for the appellant is mistaken when he argues that the petition is drawn upon that theory. The petition sets out that the defendant's foreman negligently allowed plaintiff's place to work to become unsafe and dangerous, in that the said foreman negligently and carelessly allowed and permitted the hoisting machine to be operated while plaintiff was performing the work he had been ordered to do. It is, therefore, plainly to be seen that the negligence charged in the petition consisted of the failure on the part of defendant to exercise reasonable and ordinary care to furnish to the plaintiff a reasonably safe place in which to do the work he was directed to do. As stated before the authorities cited by the learned counsel for the appellant on this pro-

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position are not in point. They simply held that in this kind of a case the doctrine of *res ipsa loquitur* cannot be invoked, but they clearly have no application to this case, for the reason that this case is predicated upon the duty of the master to exercise ordinary care to furnish and maintain a reasonably safe place for the servants to work. [Koerner v. St. Louis Car Company, 209 Mo. 141, 107 S. W. 481; Bradley v. C. M. & St. P. Ry. Co., 138 Mo. 293, 39 S. W. 763; Benedict v. C. G. W. Ry., 104 Mo. App. 218, 78 S. W. 60.]

In the case of Koerner v. St. Louis Car Company, 209 Mo. 141, 107 S. W. 481, a painter was ordered by his foreman to work on a car and while the painter was performing the work he was ordered to do, he was injured by a switching crew moving the car. In that case the Supreme Court speaking through GANTT, C. J., said:

"But there is another view upon which the plaintiff was entitled to have his case submitted to the jury. It is the duty of the master to provide and maintain a reasonably safe place for his servant to work. Wendler v. Furnishing Company, 165 Mo. 527; Herdler v. Stove & Range Co., 136 Mo. 3; Moore v. Railroad, 85 Mo. 588; Curtis v. McNair, 173 Mo. l. c. 280; Purcell v. Shoe Co., 187 Mo. l. c. 285. When the defendant, through the paint boss, Mehlin, sent the plaintiff to work upon the unfinished car, on one of its tracks, it was its duty to provide against other cars running down against the car upon which he was working and to see that other cars which were pulled out were not attached to the car upon which he was working without giving him warning of its intention to move the said car. While the servants in entering the service of the master assumes the risks that ordinarily and usually are incident to the business being conducted by the master, the servant does not assume the risk arising from the master's neglect to adopt suitable precaution for his safety. The duty of the master in this regard is a continuing one and it will

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not suffice to say that when plaintiff went to work on the car it was a reasonably safe place. If the place was afterwards rendered unsafe by the negligent act of the defendant in sending a switching crew in there who negligently pulled the car upon which plaintiff was working without giving him warning of their intention to move it, then defendant was liable for the consequences of the negligent act of the switchman. The plaintiff had the right to presume, in the absence of knowledge to the contrary, that the defendant would furnish him a reasonably safe place to work and that he would not imperil his safety by sending its servants in there to move the car upon which he was working without notifying him. [Doyle v. M., K. & T. Trust Co., 140 Mo. 1.]"

In the case of Bradley v. C., M. & St. P. Ry., 138 Mo. 293, 39 S. W. 763; it is said:

"It cannot be fairly said in the circumstances that plaintiff assumed all the risks of injury from falling earth. He only assumed such risks as were incident to the work as conducted by defendant. Defendant impliedly agreed, when it employed plaintiff and put him at a dangerous place to work, that it would use reasonable care to prevent the caving of the embankment upon him. The circumstances, in our opinion, do not take this case out of the general rule that the master is bound to use reasonable care to keep the place to be used by the servant, in the prosecution of the work assigned to him, in as safe a condition as the nature and character of the work would permit.

"Whether defendant did its duty in that respect, in this case, was, we think, a question for the jury. The evidence tends to prove that the bank was left undermined, and 'bulging out' for three or four hours before the shovel was moved up to it, or at least before the earth fell. Whether the dangerous condition was such as could have been seen by reasonable examination was a question also for the jury. If its dangerous condition was known to defendant there was negligence in not righting it. If the condition was obser-

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vable from reasonable inspection there was negligence in not knowing it, if, in fact, it was unknown."

From the above authorities and the cases therein cited it is readily seen that it is not only the duty of the master to exercise reasonable and ordinary care to furnish the servant a reasonably safe place in which to work, but to keep it reasonably safe for the servant to perform the labor required of him. It follows, therefore, from what has been said in the above authorities that the petition stated a cause of action and the court committed no error in allowing evidence to be introduced to support it.

POINT II.

The appellant insists that the court committed error in overruling defendant's motion in arrest of judgment, because the petition was not sufficient to support the verdict of the jury. What has been said above disposes of this point, for it is our opinion that the petition does state a cause of action.

POINT III.

The appellant complains that the trial court erred in allowing in the evidence, over objection, testimony tending to show that the plaintiff had not been working, and was unable to work, since he had left the hospital where he was taken upon receiving the injuries. The reason given by the appellant for error in this particular is based upon the ground that there is no claim in the petition for loss of services and that, therefore, the evidence was incompetent. A careful reading of the record shows that this evidence was admitted by the trial court simply to show the permanency and extent of plaintiff's injuries and disabilities, which were set forth in the petition, and for this purpose it was clearly admissible. In the instruction on the measure of damages, given on behalf of plaintiff, no claim was made that plaintiff was entitled to recover for any loss of services, so that it is very clear that no error was committed by

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the trial court in allowing this testimony, and it is equally clear that the trial court admitted the evidence to show only the extent and permanency of plaintiff's injuries, and not for the purpose of allowing a recovery for the loss of services.

POINT IV.

During the course of the trial one Dr. Frazer, testified that he had many years' experience as a physician and surgeon, and had taught in many medical colleges, and further testified as follows:

"Q. Now, I will ask you to tell the jury what your opinion is with reference to the permanency of that injury.

Objected to.

The Court: Have you examined him—the plaintiff? A. Yes, sir.

The Court: When? A. The 29th of December, 1913.

The Court: He may answer.

To which ruling of the court counsel for defendant then and there duly excepted. A. This is a permanent injury.

Q. What is your opinion with reference to this man's leg becoming normal and as to his being able to perform heavy labor?

Objected to because under the pleadings there is no issue made as to plaintiff being rendered unable to perform heavy labor or that he has lost or will lose in the future any services of any kind or character.

Objection overruled; to which ruling of the court counsel for defendant then and there duly excepted.

A. In shape and in color of the skin—condition of the skin—it will never become normal. He will be able to walk on it; as time goes on he will be able to do some work, but never able to sustain any great weight for any considerable length of time on the extremity.

Q. With reference to heavy lifting or heavy labor, will he ever be able to do such work as he could before?

Objected to because it calls for a conclusion of the witness and calls for the witness to determine a fact

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which should be submitted to the jury, and for the further reason that under the pleadings in this case it is incompetent, irrelevant and immaterial, there being no charge or allegation in the petition that the plaintiff had lost or would in the future lose any labor by reason of his injuries; and for the further reason that the question should have called upon the witness to give his reasons and not to have stated a fact which should have been left to the jury.

Objection overruled; to which ruling of the court counsel for defendant then and there duly excepted.

A. He will not be able to continuously do hard labor. So far as the shape of the leg, or its configuration, is concerned it will never be normal again. There will always be more or less swelling around the ankle joint. The bones themselves will never be quite normal, because where the union has taken place a callous has been formed and thrown out, absorbing the softer tissues in the leg, the muscles particularly. It will be impossible for this man to do hard work, that is, contiously. It may be, in the course of long years, for a length of time, for maybe a few hours in a day, that he can put some weight on that extremity."

The appellant complains that the court erred in allowing the physician and surgeon to answer the last question on the ground that it calls for a conclusion of the witness, and is not an opinion, and cites many authorities, among them being the following: Holtzen v. Railroad, 159 Mo. App. l. c. 374; Thomas v. Metropolitan Street Railway Company, 125 Mo. App. l. c. 374; Thomas v. Metropolitan Street Railway Company, 125 Mo. App. 131, 100 S. W. 1121; Glasgow v. Railroad, 191 Mo. 347, 89 S. W. 915. These cases do lay down the principle that an expert witness or a physician can only give his opinion and cannot testify to conclusions, but we believe that they have no application to the point involved here, for it is clear upon the reading of the testimony of the doctor that the question calls for his opinion as to whether or not the plaintiff would be able to do heavy lifting or heavy

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labor or work as he could before he was injured, and it is clearly a matter for expert testimony.

POINT V.

Instruction No. 1 given for the plaintiff contains the words: "negligently and carelessly allowed the hoisting machine and bucket to be operated on said dump near plaintiff." The appellant contends that this instruction is broader than the petition in that the words; "and bucket" are added to the words: "hoisting machine," the charge in the petition being: "negligently and carelessly and in disregard of plaintiff's safety allowed and permitted a hoisting machine to be operated near plaintiff." This point is very technical and is, we believe, without merit. The evidence clearly shows that the bucket was a part of the hoisting machine just as the cable to which the bucket was attached was a part of the hoisting machine. The instruction fits, exactly, the evidence which was introduced on the charge in the petition. The hoisting machine was composed of a cable and the bucket, which were operated by the engine and, of course, the words: "hoisting machine" set forth in the petition include both the cable and the bucket. Viewed in this light, we do not believe that the addition of the words: "and bucket" added to the words: "hoisting machine" can be considered as broadening the allegations of the petition or allowing plaintiff to recover on some grounds of neglect not set forth in the petition, and could in no way possibly have misled the jury. The principle contended for by the learned counsel for the appellant that the instructions should not be broader than the petition is, broadly speaking, the law, but we do not believe that the cases cited are applicable to this instruction.

POINT VI.

The appellant contends that the court erred in giving instruction number 2 on behalf of the plaintiff, and argues that it is wrong because it contained the

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following general declaration of law: "That the law required the defendant not only to furnish plaintiff a reasonably safe place to work but also required him to keep it so;" the point being, that it is not the absolute duty of the master to furnish a reasonably safe place for the servant to work, but it is only his duty to exercise reasonable and ordinary care to furnish the servant with a reasonably safe place in which to work, citing: Pruett v. Campbell Lumber Company, 188 Mo. App. 347, 174 S. W. 164; Haas v. Car & Foundry Company, 176 Mo. App. 326; Glassock v. Swafford Bros. Dry Goods Company, 106 Mo. App. 657, 80 S. W. 364; Bradley v. C., M. & St. P. R. R. Co., 138 Mo. 293, 39 S. W. 763, and others. The above cases undoubtedly establish the rule that it is simply the duty of the master to exercise reasonable and ordinary care to furnish a reasonably safe place for the servant to work. But the whole instruction must be read together, and we believe that the latter part of the instruction, and the part immediately following the words complained of, cured the general statement of the law, in that it applies the instruction specifically to the facts of the case and brings it within the correct rule of law.

In the case of Pruett v. Campbell Lumber Company, 174 S. W. 164, Judge ALLEN speaking for this court said:

"It is quite apparent that the judgment must be reversed because of error in giving plaintiff's first instruction, the only instruction purporting to cover the question of defendant's liability. This instruction authorizes a recovery if the jury find that plaintiff's injury, if any, 'was due to the negligence and carelessness of the defendant company in not furnishing plaintiff with a reasonably safe place to work.' Not only does this instruction proceed upon the theory that it is the absolute duty of the master to furnish the servant a reasonably safe place to work, whereas the master's duty is to exercise ordinary care to that end, but it is a mere general declaration of what purports to be the law applicable to a master and servant case, without

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any application whatsoever to the facts in the evidence. It fails to require the jury to find the specific negligence charged, which is alleged to have rendered unsafe the place in which plaintiff was required to work, but, on the contrary, permits a recovery if the jury believe that the defendant in any way failed to furnish plaintiff with a reasonably safe place in which to work. Such instructions have been repeatedly condemned. [See Feldewerth v. Wabash R. Co., 181 Mo. App. 630, 164 S. W. 711, and authorities there cited.]"

In the case at bar the instruction complained of does not cover the entire case and direct the verdict, but only covers the question of the assumption of risk. Instruction number 1, given on behalf of plaintiff, covered the entire case and directed the verdict, and instruction number 2, while stating the principle broadly in the first part of the instruction, continues by applying the facts in the case to the correct rule of law. We believe, therefore, that both of the objections raised by Judge ALLEN in the Pruett case, supra, were complied with. The latter part of the instruction told the jury that if they found that defendant's foreman neglected (that is, failed to exercise ordinary care) to adopt suitable precautions for plaintiff's protection, to keep the plaintiff's place of work reasonably safe, and the plaintiff was injured as a result of such neglect (that is, failure to exercise ordinary care), the plaintiff does not assume the risk of such injury. We believe that the application of the rule to the facts as set forth in this part of the instruction cured the defect in the instruction complained of. This instruction on the assumption of risk is within the rule, and almost in the very words laid down in the case of Koerner v. St. Louis Car Co., 209 Mo. 141, 107 S. W. 481, quoted from at length above.

In the case of Pendergrass v. Railroad, 179 Mo. App. 517, 162 S. W. 712, this court held that the instruction which in substance told the jury that it was defendant's duty to furnish appliances "such as a ladder for means of ingress and egress to and from said

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pump that were reasonably safe, secure and sufficient for the transaction of its business," was cured by the latter part of the same instruction which told the jury that if they should find that defendant neglected its duty in this behalf etc., and that there was a defective or insufficient crosspiece or rung upon the ladder and that defendant knew thereof "or by the exercise of ordinary care and prudence could have known the same" and that by reason thereof such crosspiece or rung of the ladder broke and gave way and thereby caused plaintiff to fall, and that plaintiff exercised ordinary care for his own safety, then the verdict should be for plaintiff.

Judge ALLEN, speaking for this court, said:

"This instruction is assailed upon the ground that it places upon defendant the absolute duty to furnish plaintiff a reasonably safe appliance or place to work; whereas, the law requires only that defendant use ordinary care to furnish a reasonably safe appliance or place to work.

"It is, of course, quite true, as appellant asserts, that the master is not an insurer of the absolute safety of the appliance furnished the servant, or of the place furnished him to work. The master's duty is unquestionably to exercise ordinary care to such end. However, we think that the instruction under consideration is not open to the attack made upon it. It is true that the earlier part of the instruction tells the jury that it was defendant's duty to furnish appliances, etc., that were reasonably safe and sufficient. Further on in the instruction, however, the jury are required to find that the defendant either knew of such unsafe or insufficient condition thereof, or by the exercise of ordinary care and prudence could have known of the same. [See Girard v. Coke & Coal Co., 207 Mo. 242, 105 S. W. 767.]"

In the case of Girard v. Coal & Coke Co., 207 Mo. 242, 105 S. W. 767; GRAVES, J., speaking for the court said:

"The contention is that this instruction states too broadly the measure of duty owing by the defendant

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to the plaintiff. In other words, defendant says that this instruction makes it the absolute duty of defendant to furnish plaintiff a reasonably safe entry, whereas the law only requires the defendant to use ordinary care to keep the entry way in a reasonably safe condition. The criticism is directed to the first paragraph of the instruction. This court upheld a verdict in a case where a very similar instruction was given. [Smith v. Fordyce, 190 Mo. l. c. 12.] The first part of the instruction in the Smith case, supra, was fully as strong as the instruction now in question. But aside from this, when the whole instruction is read together, we think the law was properly declared. The broad statement of general principles is modified by the second paragraph of the instruction.

"In the case of Bradley v. Railroad, 138 Mo. l. c. 308, where there was under consideration a very similar instruction, upon this point, that is, as to the modification of the broad general statement in the first part of the instruction by a second and subsequent clause, where the application of the law is made to the facts, the Supreme Court said: 'It seems to us that this part of the instruction explains, qualifies and renders harmless what precedes it. It points out what omissions of duty on the part of defendant will constitute a neglect to provide a safe place for plaintiff to work in the circumstances in this case.'

"So in this instruction. The broad statement of duty contained in the first paragraph is modified by the explanatory language of the second paragraph. The instruction will not be condemned for the reason urged first by defendant."

We believe that the judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

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P. M. SCHLAMP, Appellant, v. L. A. MANEWAL et al., Respondents.

St. Louis Court of Appeals, December 30, 1916.

1. **BILLS AND NOTES: Negotiation of Accommodation Note After Maturity: Diversion of Note: Rights of Accommodation Maker.** Where one of the makers of a promissory note signs for the accommodation of his co-maker and the note is negotiated after maturity, the transferee takes it, under Sec. 10028, R. S. 1909, subject to the defense that it was used for a purpose other than the one for which the accommodation maker signed it.

2. ———: ———: ———: **Sufficiency of Answer.** In an action against the two makers of a promissory note, one of the defendants averred in his answer that he signed the note for the accommodation of his co-maker, in order that the latter might have the note discounted at a certain bank, that it was understood that the note was to be so discounted for cash only, and that, when this was not done, the purpose for which the note was given failed, and upon its being negotiated by the co-maker to plaintiff, after its maturity, for stock in a corporation, there was a diversion of the note from its original purpose, which relieved the accommodation maker from liability thereon. *Held*, that the answer sufficiently pleaded the defense of diversion.

3. ———: **Evidence: Negotiation of Accommodation Note After Maturity: Parol Evidence.** Parol evidence is admissible, in an action on an accommodation note negotiated after maturity, to show that the note was used by the accommodated party for a purpose other than that for which the accommodation party signed it

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey,* Judge.

AFFIRMED.

Thomas D. Cannon for appellant.

(1) The answer of defendant Manewal avers no defense to the plaintiff's petition, and upon the record the plaintiff is entitled to a direction from this court to the trial court to enter judgment in plaintiff's favor upon the cause of action set forth in his petition. Bank v. Refgr. Co., 236 Mo. 415; Poindexter v. McDowell,

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110 Mo. App. 233; First Nat. Bank v. Bennett, 114 Mo. App. 695. (2) Upon the record at the close of the whole case the plaintiff was entitled to a peremptory instruction directing a verdict in his favor against both defendants as requested by instruction "B," and the court erred in refusing said instruction. Bank v. Refgr. Co., 236 Mo. 415; Poindexter v. McDowell, 110 Mo. App. 233; First Nat. Bank v. Bennett, 114 Mo. App. 695. (3) The note in suit was negotiated by Emil Schlamp to P. M. Schlamp, the plaintiff, for value; and even though it was negotiated after maturity for the first time, it is still a binding and valid obligation against both defendants, the accommodated and accommodating party. Marling v. Jones, 138 Wis. 89; Mersick v. Aldermann, 77 Conn. 634; Johnson v. Franklin Bank, 173 Mo. 182. (4) The liability of Manewal on the note sued on is that of a joint maker. Citizens Bank v. Douglas, 178 Mo. App. 689; Sec. 10,161, R. S. 1909. And the court erred in giving and reading to the jury instruction number 2, whereby it directed a verdict for defendant, Manewal, if the jury found that "he (Manewal) received none of the stock or proceeds thereof taken over by Schlamp for said note." Failure of consideration moving to Manewal is no defense to him in this case. Sec. 10,000, R. S. 1909; Banking Company v. Morrow, 184 Mo. App. 518. (5) Instruction number 2 is erroneous in that it directs the jury to find a verdict in favor of defendant Manewal if the jury "further find that the defendant Manewal did not authorize the negotiation and delivery of said note after its maturity, and did not know that it had been so negotiated and delivered to plaintiff after maturity." The note did not cease to be a negotiable instrument when it fell due. Biglow on Bills and Notes (2 Ed.), p. 253; Sec. 10,017, R. S. 1909; Lane v. Hyder, 163 Mo. App. 688; Hunleth v. Leahy, 146 Mo. 418. The agency of the party accommodated (Schlamp) to negotiate the note in suit and raise the money thereon did not cease at maturity of the note. And the mere fact that the note was not negotiated by Schlamp until after

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maturity cannot defeat the plaintiff's recovery upon the ground that there was no consideration moving to Manewal (if such was the fact). Marling v. Jones, 138 Wis. 90; Mersick v. Aldermann, 77 Conn. 634; Brannon Neg. Instr. (2 Ed.), p. 38. (6) The court erred in admitting testimony, over plaintiff's objection to show the note sued upon was to be discounted for cash only. Parol evidence is not admissible to show that the maker of a note, which purports to be payable absolutely, only promised to pay upon condition. Bank v. Martin, 171 Mo. App. 201; Holmes v. Farris, 97 Mo. App. 309.

Vital W. Garesche and *George B. Webster* for respondent.

(1) The appellant did not challenge the sufficiency of the answer by demurrer or motion in arrest in the lower court, nor did he assign the alleged insufficiency as error in his motion for a new trial. The point is therefore not available for his purpose in this court. Wilkerson v. Bruce, 37 Mo. App. 156; Oil Well Supply Co. v. Wolfe, 127 Mo. 624; Stark v. George Knapp & Co., 160 Mo. 529; State Bank v. Citizens Bank, 114 Mo. App. 663; Johnson County Bank v. Mills, 143 Mo. App. 265; Long v. Lackawanna C. & I. Co., 233 Mo. 713. (2) The trial court was right in refusing to direct a verdict for the appellant. To have done so would have been error. Dyer v. Cowden, 168 Mo. App. 649; Hancock v. Railroad, 163 Mo. App. 259; First Nat'l Bank v. Gregg, 74 Mo. App. 639; Johnson v. Grayson, 230 Mo. 380. (3) The negotiation of the note after maturity did not keep it alive as a valid obligation of the respondent, for the record shows without contradiction that he neither knew of it nor participated in the negotiation or the proceeds thereof. R. S. 1909, sec. 9978. (4) The respondent was not liable as a joint maker as between himself and the appellant. Norton, Bills and Notes (3 Ed.), sec. 85; Lamson v. Beard, 94 Fed. 43. (5) The court's instruction number 2 is a correct declaration of law and was

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properly given. R. S. 1909, secs. 9999, 10022; Farmers Natl. Bank v. Dreyfus, 82 Mo. App. 399; Grand River College v. Robertson, 67 Mo. App. 329; Jones, Evidence, Civil Cases (2 Ed.), sec. 495. (6) There was no error in the admission of evidence to show the purpose for which the note was given. Ware v. Allen, 128 U. S. 590; Shantz v. Shriner, 167 Mo. App. 635; Farmers Natl. Bank v. Dreyfus, 82 Mo. App. 399; Williams v. Abrutt, 72 Mo. App. 62; Grand River College v. Robertson, 67 Mo. App. 329; Jones, Evidence, Civil Cases (2 Ed.), sec. 495.

THOMPSON, J.—The plaintiff sued the defendants upon the following note:

"$1,000.00 St. Louis, May 8, 1912.

"Ninety days after date we promise to pay to the order of P. M. Schlamp, One Thousand and no/100 Dollars, for value received, negotiable and payable without defalcation or discount, with interest at the rate of —— per cent. per annum from ————. Payable at ————.

EMIL SCHLAMP.
L. A. MANEWAL."

The jury returned a verdict in favor of the plaintiff and against the defendant Emil Schlamp, but further found in favor of defendant L. A. Manewal and against the plaintiff. Plaintiff filed a motion for a new trial which was overruled, and he has perfected his appeal to this court. The trial court directed the jury to return its verdict against the defendant Emil Schlamp.

The evidence on the part of the defendant, L. A. Manewal, tended to show that at the time the note in suit was executed, he was a neighbor and a friend of Emil Schlamp, the other defendant; that the said Emil Schlamp came to him for the purpose of borrowing $1,000 for use for his family, but Manewal informed said Emil Schlamp that he was unable to lend him the money at that time; that thereupon the said Emil Schlamp requested Manewal to sign a note with him,

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payable to the order of P. M. Schlamp, the plaintiff herein. On the assurance or statement from the said Emil Schlamp that he, together with his nephew, plaintiff herein, could discount such a note at a bank in Henderson, Kentucky, where the plaintiff was well known, the defendant Manewal signed the note, which is the note here sued on, and delivered the same to Emil Schlamp, the other defendant, who, in turn, immediately or shortly after its execution turned it over to the plaintiff, P. M. Schlamp, who tried to discount it in Henderson, Kentucky, but failed. Thereupon he, the plaintiff, endorsed the note "without recourse" and returned the same to Emil Schlamp. Manewal testified that after the failure of the plaintiff to discount the note at Henderson, Kentucky, he was informed by Emil Schlamp of the failure to so discount the note and informed him, Manewal, that he, Emil Schlamp, had destroyed the note. Manewal further testified, over objection of plaintiff, that at the time the note in question was executed by him, it was agreed between him and Emil Schlamp that the said note was to be discounted only for cash. After the note had been returned by the plaintiff to the defendant Emil Schlamp, it seems that, instead of said note being destroyed, the said Emil Schlamp retained the same in his possession, and in August, 1912, and two days after it was due on its face, he delivered it over to the plaintiff in this case and took from him in payment thereof one hundred shares of the capital stock of the par value of $10 each in a corporation known as the Vaza Company, which, at that time, was being promoted by the plaintiff.

The above facts were practically conceded by the plaintiff, except that he testified that he did not know that the defendant, Manewal, had signed the note as an accommodation for Emil Schlamp, but did know that Emil Schlamp was to receive the money upon the note being discounted, but understood from Emil Schlamp, that the note was given to him signed by Manewal to adjust some account or business dealings between him

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and Manewal. He also testified that the stock above referred to was worth par at the time he acquired the note. After the note was turned over by Emil Schlamp to plaintiff, in August, 1912, it remained in the possession of the plaintiff until some time in January or February, 1913, when he presented it through a bank for collection to Manewal, and upon payment being refused instituted this suit on said note.

The defendant Manewal set up in his answer that he had signed the note for the accommodation of Emil Schlamp in order that said Emil Schlamp and the plaintiff might have the note discounted at a bank in Henderson, Kentucky, and it was understood that the note was to be so discounted for cash only, and that when this was not done, the purpose for which the note was given failed, and upon it being negotiated by Emil Schlamp to the plaintiff after its maturity for stock, there was a diversion of the note from its original purpose which relieved the defendant Manewal from liability thereon.

The deposition of Emil Schlamp was introduced in evidence by the plaintiff as an admission against interest, and was received by the lower court for that purpose only. Inasmuch as Emil Schlamp did not appeal, the deposition, thus introduced, is not before this court at this time.

At the close of the case the court refused to give a peremptory instruction to find for the plaintiff and against the defendant Manewal, and gave of its own motion the following instruction:

"You are still further instructed that if you believe and find from the evidence in this case that the note sued on was signed by the defendant L. A. Manewal, with Emil Schlamp, for the purpose of raising money thereon, for the use of said Emil Schlamp; that no consideration for said note was then either given or intended to be given by the payee therein, P. M. Schlamp, the plaintiff herein; and that said note was delivered by Emil Schlamp to plaintiff, in the first instance, for the sole purpose of having the same

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discounted for the benefit of said Emil Schlamp by a bank at Henderson, Kentucky; that plaintiff took said note from Emil Schlamp for that purpose only, and endeavored to have the same discounted, but failed; and thereafter, and before the maturity of said note, returned the same to the possession of said Emil Schlamp, one of the makers, and that the said Emil Schlamp continued to hold said note, up to and after the date of its maturity, and that after the date of its maturity the defendant Emil Schlamp negotiated and delivered said note for the first time to the plaintiff for value, and received therefor the Vasa stock mentioned in the evidence; and if you still further find that the defendant, L. A. Manewal, did not authorize the negotiation and delivery of said note after its maturity, and did not know that it had been so negotiated and delivered to the plaintiff after maturity, until long after such negotiation and delivery, and that he received none of the stock or the proceeds thereof, taken over by said Emil Schlamp for said note—then your verdict should be for the defendant L. A. Manewal."

The learned counsel for the appellant assigns as error the giving by the court of the above instruction. This raises the question as to whether or not there was a diversion of the note from its original purpose. If there was a material diversion, and the plaintiff had acquired the note with full knowledge of the purpose for which it was issued, before maturity, then under the authorities he could not hold the accommodation maker, and it follows that if there was a diversion of the note by the accommodated party from the purpose for which it was originally made, and the plaintiff acquired it after its maturity, he was bound to know of the diversion and would not be permitted to say that he did not know of it. [Daniels on Negotiable Instruments (6 Ed.), page 931; Section 10028, R. S. 1909; Norton on Bills and Notes (3 Ed.), page 180; St. Louis National Bank v. Flanagan, 129 Mo. 178, 31 S. W. 773; Farmers National Bank v. Dreyfus,

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82 Mo. App. 399; Berkeley & Harrison v. Tinsley, 88 Va. 1001; Grand River College v. Robertson, 67 Mo. App. 329.]

In Hickerson v. Raiguel, 2 Heiskell (Tenn.) 239, it is said:

"The proof shows that when complainant indorsed the bill, he did so upon the express condition that if the Planters' Bank did not discount the bill on that day, his liability as indorser was to cease, and the bill was either to be returned or destroyed. It is wholly immaterial whether complainant knew the use which Sheild proposed to make of the money, or not. He was indorsing without consideration, and for the accommodation of Sheild, and had the right to annex such terms and conditions to his liability as he saw proper. [Perkins v. Ament, 2 Head, 110; Bank of Tennessee v. Johnson, 1 Swan, 217.] It is clear that when the Planters' Bank refused to discount the bill, and the day had expired during which it was to be presented, the liability of complainant was terminated. The only liability which could then be created must have arisen from the transfer of the bill, in the due course of trade to some innocent purchaser, for value. But the proof shows that when Sheild offered to transfer the bill to Clemments, who was acting as the agent of Raiguel & Co., in the collection of their execution, he informed him of the terms and conditions which complainant had annexed to his indorsement. It follows that Clemments took the bill with full notice that Sheild had no authority to use it for any purpose and in any way. As Clemments was acting as the agent of Raiguel & Co., they would be affected with the notice which their agent had."

In Daniels on Negotiable Instruments (sixth edition), p. 930, it is said:

"And if any one purchase accommodation paper with knowledge that the terms and conditions on which the accommodation was given have been violated, he is not a bona-fide holder as against the party who lent his name for accommodation."

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The above instruction in substance told the jury that if they found from the evidence that the note was signed by the defendants for the sole purpose of raising money for the use of Emil Schlamp by discounting the same at a bank at Henderson, Kentucky, and that the plaintiff received the note from Emil Schlamp for that purpose only, and endeavored to discount the note but failed to accomplish that purpose and returned it to Emil Schlamp, and that Emil Schlamp after maturity of the same, turned it over to the plaintiff and took therefor stock in a certain corporation, and this was done without the consent of the defendant Manewal, that then the plaintiff could not recover against Manewal. This instruction is evidently based upon the principle that there was a diversion of the note by the accommodated party from the purpose for which the accommodation party signed it, and it being delivered or turned over to the plaintiff after its maturity, he was bound to know of the diversion,. We think that the learned trial court was correct in so instructing the jury. The defendant Manewal might have been perfectly willing to lend his credit to the accommodated party in the form of an accommodation note to be immediately discounted for cash to be used for the support of the family of the accommodated party, and at the same time he might have been very unwilling to lend his credit to the accommodated party in the form of a signature on a note in order that the accommodated party might use that note for the purpose of speculating in a stock of a corporation just being floated upon the market. If the note in suit was issued for the purpose set out in this instruction, then upon the failure to discount it for cash at the bank at Henderson, Kentucky, the whole purpose for which it was issued failed, and the accommodated party would have no authority or right to use it for the purpose of making a speculation in stock.

The plaintiff contends that the answer avers no defense, and that the plaintiff was entitled to an instruc-

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tion to the jury to return a verdict against the defendant Manewal. We have given this matter the utmost consideration and thorough investigation of the authorities, and we cannot agree with the learned counsel for the plaintiff, for the reason that we are of the opinion that the answer sufficiently states the defense of diversion, and it was proper to put this defense to the jury, as was done in the instruction mentioned above.

What is said above entirely disposes of all the assignments of error, with the exception of the assignment that parol evidence was not admissible to show the purpose for which the paper was signed by this accommodation maker, in that it would vary the terms of the note or agreement and make what appears to be an agreement to pay money absolute only an agreement to pay upon condition. This point was squarely passed upon in the case of the St. Louis National Bank v. Flanagan, 129 Mo. 178, 31 S. W. 773. In that case Flanagan had signed a note for the accommodation of one Florida, who diverted it from the purpose for which it was originally intended, and turned it over to the plaintiff's bank. In an exhaustive opinion by GANTT, P. J., among other things the court said:

"There was no error in permitting Flanagan to testify not only that he was a mere accommodation maker of the note but the purpose for which Florida stated he wanted the discount when he obtained Flanagan's signature. He was attempting to show a diversion of the note and the initial step was to show its original purpose, and notice to the plaintiff of that purpose. The evidence was material and competent though he might fail to satisfy the court of the diversion."

To the same effect are the following authorities: Farmers National Bank v. Dreyfus, 82 Mo. App. 399; Grand River College v. Robertson, 67 Mo. App. 329; Williams v. Alnutt, 72 Mo. App. 62; Shantz v. Shriner, 167 Mo. App. 635, 150 S. W. 727.

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In view of these authorities, we rule, therefore, that the parol evidence was clearly competent in this case.

Plaintiff was the payee in the note. He acquired it after maturity. As above stated he, therefore, stands in no better position that if he had acquired it before maturity knowing all of the defenses available to defendant Manewal.

The judgment is therefore affirmed. *Reynolds, P. J.*, and *Allen, J.*, concur.

ROBERT B. MUNROE and J. L. HORNSBY, Administrators, Respondents, v. JAMES P. DOUGHERTY et al, Appellants.

St. Louis Court of Appeals. Submitted on Briefs, November 16, 1916. Opinion Filed December 30, 1916.

1. **JUDGMENTS: Appeal from Justice's Court: Failure of Defendant to Appear: Nature of Judgment.** A judgment rendered against the defendant by the circuit court, in a case appealed by defendant from a justice's court, upon evidence adduced by plaintiff, defendant failing to appear at the trial, was not a "default judgment."

2. ———: ———: **Requisites of Motion to Vacate Judgment.** In order for the circuit court to set aside, on motion, a judgment rendered against the defendant, in a case appealed by him from a justice's court, defendant having failed to appear at the trial, it is necessary that the motion show that defendant had good reason for failing to appear and that he had a meritorious defense.

3. **APPELLATE PRACTICE: Proceeding to Vacate Judgment: Discretion of Trial Court: Review.** The right to set aside a judgment rendered by the circuit court against the defendant, in a case appealed by him from a justice's court, defendant having failed to appear at the trial, rests largely in the discretion of the circuit court, and the appellate court will interfere only where it clearly appears that such discretion has been abused.

4. **JUDGMENTS: Proceedings to Vacate: Sufficiency of Motion.** Defendant failed to appear in the circuit court, at the trial of a case which he had appealed from a justice's court, and the court, after hearing evidence, rendered judgment against him. He moved to

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set aside this judgment, setting up as a reason for his failure to appear at the trial, that he had employed, or believed he had employed, a certain named attorney to represent him, but that said attorney did not understand that he was so employed. *Held*, that the motion was insufficient, for if defendant did employ the attorney, his neglect would be defendant's neglect, and, in order to excuse defendant's default on the ground he "believed" he had employed the attorney, it was necessary that the motion show the *facts* upon which such belief was predicated, so that the court could determine whether or not such belief was justified.

5. ———: ———: ———. A motion to vacate a judgment must set out facts; conclusions being insufficient.

6. ———: ———: **Misunderstanding Concerning Employment of Attorney.** A defendant cannot ordinarily procure the vacation of a judgment against him, on the ground of a mistaken belief that he has obtained an attorney to protect his interests, but he must see to it that the attorney understands and accepts the retainer; otherwise his failure to personally see to the case is inexcusable.

7. **ATTORNEY AND CLIENT: Neglect of Attorney.** The neglect of an attorney to look after a case is chargeable to his client.

7. **JUSTICES' COURTS: Failure to Give Notice of Appeal: Trial De Novo: Rights of Appellee.** Sec. 7584, R. S. 1909, providing that, where one appealing from a justice's court fails to give notice of appeal at least ten days before the second term of the circuit court after the appeal is taken, the judgment shall be affirmed or the appeal dismissed, at the option of the appellee, does not deprive the appellee of the right to waive the notice of appeal and enter his appearance in the circuit court and to have the cause tried *de novo*, pursuant to Sec. 7579, since the purpose of serving notice of appeal is to confer jurisdiction on the circuit court over the person of the appellee, and such jurisdiction is given by waiver of notice and entry of appearance by the appellee.

Appeal from St. Louis City Circuit Court—*Hon. Eugene McQuillin,* Judge.

AFFIRMED.

W. G. Carpenter for appellants.

(1) Mere forgetfulness of the party or his attorney will not excuse him. But misunderstanding or mistake undoubtedly will. It is a case of an honest mistake of fact. Parks v. Coyne, 156 Mo. App. 395; Barto v. Electric Co., 119 Iowa, 179; Davis v. Carp, 139 Mo.

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App. 650; Realty Co. v. Timmerberg, 178 Mo. App. 655; Breed v. Hobard, 187 Mo. 140. (2) Appellate courts favor a trial on the merits of the case and are more inclined to interfere with the discretion of the court where this is refused. Realty Co. v. Timmerberg, 178 Mo. App. 659. (3) Each case must be determined from the circumstances surrounding it and cannot be governed by settled rules of law. Parks v. Coyne, 156 Mo. App. 391; Perry v. Stone Co., 173 Mo. App. 418.

Adrian Steel for respondents.

(1) The judgment rendered by the circuit court in the case at bar is not a judgment of *nil dicit* or by default, but is a judgment rendered upon a regular setting of the case upon a trial at which plaintiff appeared but defendants failed to appear, and consequently no interlocutory judgment against defendants could be or was rendered. 23 Cyc. 734, n. 48; 23 Cyc. 743, n. 14. (2) If this were a judgment by default, as claimed by appellant, a motion to set aside the same after final judgment is not the proper procedure. Sec. 2101, R. S. 1909; Matthews v. Cook, 35 Mo. 286; Burnes v. Burnes, 61 Mo. App. 612; Billingham v. Miller, 115 Mo. App. 154. (3) The appellants are not entitled to relief on the ground of mistake in the employment of an attorney because they have not shown any diligence in looking after their interests. Colter v. Luke, 129 Mo. App. 707; Hoffman v. Loudon, 96 Mo. App. 184; 23 Cyc, 934; Parks v. Coyne, 156 Mo. App. 391 (and cases cited); Squiers v. Bird, 22 Mo. 470; Nordmauser v. Hitchcock, 40 Mo. 178.

THOMPSON, J.—This was an action on a promissory note brought by O. M. Munroe against the defendants. The plaintiff had judgment in the circuit court, and upon motion to set aside said judgment being overruled, defendants appealed.

The note sued on is in words and figures as follows:

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"$16 (Red)
$385 "Fenton, Mo. Sept. 22, 1904.
$401 (Red)

"Six months after date I promise to pay to O. M. Munroe of Jefferson County Bank of De Soto, Mo., or order, three hundred eighty-five dollars, for value received, with interest from date at the rate of eight per centum per annum until paid, and I agree to pay same at Jefferson County Bank of De Soto, Mo.

"Principal: JAMES P. DOUGHERTY,
"Securities: C. DOUGHERTY,
"E. J. DOUGHERTY."

This suit was instituted on the above promissory note before a justice's court in St. Louis, Missouri, and judgment was rendered in said court in favor of the plaintiff and against all of the defendants, on October 6, 1913, at which time all of the defendants appeared in person and by their attorney. Thereafter, on the 15th day of October, 1913, all of the defendants took an appeal to the circuit court of St. Louis, having filed proper affidavit and appeal bond, and thereafter, on the 29th day of November, the defendants paid the docket fee of the circuit court of St. Louis, and duly filed therein a transcript of all the proceedings before the justice's court, and the said cause was duly assigned to division 6 of the said circuit court. Thereafter, on April 20, 1914, the case was called for trial in division 6 of the circuit court of St. Louis. The plaintiff was present and ready for trial, but the defendants did not appear, although called; whereupon plaintiff, waiving a jury, submitted his case to the court, introduced his evidence and proofs, and the court having heard and duly considered the same, found in favor of the plaintiff and against the defendants, and rendered a judgment against the defendants in the sum of $531.30.

Thereafter, on the 21st day of May, 1914, and at the same term of court at which the above-named judgment was entered—that is, the April term, 1914, the separate motion of James P. Dougherty was filed

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to set aside said judgment, and on the same day the joint motion of Cornelius and E. J. Dougherty was likewise filed to set aside the said judgment. Both of these motions were passed to the June term, 1914, and on June 5th both of said motions were overruled. The defendants have perfected their appeal to this court, and since that time the original plaintiff, O. M. Munroe, died, and this action has been revived by consent of the parties in the name of Robert B. Munroe and J. L. Hornsby, his administrators. The said motion of the defendant, James P. Dougherty, to set aside the judgment was as follows:

"Comes now James P. Dougherty and for his separate motion to set aside a default judgment heretofore granted in this case on April 20, 1914, respectfully shows to the court that he had no notice or knowledge of the setting of this case on the said April 20, 1914, or any other such time.

"That he employed or believed he employed W. G. Carpenter as his attorney to look after and take charge of the said case, for him to appear therein and act as attorney, and to represent him in said cause, but the said W. G. Carpenter did not so understand that he was so employed, hence failed to look after the matter and the said cause was not properly cared for on his part.

"That the said James P. Dougherty so filing this motion appealed from the judgment of the justice of the peace against him as rendered on the sixth day of October, 1913, for four hundred and forty-two dollars and twenty cents because he believed he had a just and meritorious defense to said cause of action, in that he has records of payments made on the said note which go to reduce the amount from the amount of the judgment so rendered against him and your petitioner herein respectfully represents to the court that the judgment as rendered herein against him for five hundred and thirty-one dollars and thirty cents ($531.30), being eighty-nine dollars and ten cents ($89.10) greater than the judgment rendered against him in the justice's

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court, has deprived him of still further and additional credits which should be applied upon the said note as herein filed; that your petitioner has book records of the payments which should be so applied on the said note and none of which are herein credited; all of which are good and valid matters of defense of which petitioner should not be deprived; and your petitioner further respectfully shows that the judgment as rendered by the court upon his failure to appear, his course of action should have been to dismiss the appeal or affirm the judgment of the justice's court, that this court has no right of jurisdiction to hear anew. This course of action to make another or different finding from the justice's court on default of its appellate worth.

"Petitioner prays that the said default judgment so granted be set aside and defendant granted a new trial herein.

"JAMES P. DOUGHERTY.

"State of Missouri, } ss
City of St. Louis. }

"Subscribed and sworn to before me this 18th day of May, 1914.

(Seal) "W. G. CARPENTER,
"Notary Public."

The joint motion of E. J. and Cornelius Dougherty to set aside the judgment was as follows:

"Comes now Cornelius Dougherty and E. J. Dougherty, defendants in the above-styled cause, and implore the court to set aside the default judgment granted against them on April 20, 1914, for the following reasons, to-wit:

"The said petitioners herein had no knowledge or notice of the setting of this said case or the trial of same, but understood that they had employed an attorney, W. G. Carpenter, to appear for them, look after and take care of their interests in said cause, but the said W. G. Carpenter did not so understand said employment, did not understand that he was to take care

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of their interests and so did not give proper attention to the case and the same was called and heard without any notice or knowledge of these defendants.

"That these defendants have a good and valid defense to the claim of plaintiff in the following manner, to-wit: That said note which is the basis of this action they had signed as suretites for defendant James P. Dougherty, which note was made and executed on the 22nd day of September, 1904, and was to become due six months after date. That the said note has, without their consent and without their knowledge, received many and various extensions thereon, at many and various times since the said September 22, 1904, and at no time were they ever consulted nor did they ever give their consent to such extensions, but at all times they refused to consent because at that time the principal of said note, James P. Dougherty, could have paid same.

"That the said extensions have operated against these petitioners and they should not now be held liable on said note; further, your petitioners respectfully state that the judgment as rendered in this cause on April 20, 1914, has failed to give the proper and necessary credits which should be applied upon said note; that the amount so rendered is larger than is now due or owing on said note, and that book entries of other payments on said note are available to be used as evidence. Further, these petitioners show the court that they are appellants in this cause, having appealed from the judgment of the justice rendered on the sixth day of October, 1913, which said judgment as rendered against them was for the amount of four hundred and forty-two dollars and twenty cents; that the judgment as rendered by this court on April 20, 1914, for five hundred and thirty-one dollars and thirty cents is another and different judgment from that rendered by the justice; that this court has no right of jurisdiction under the statutes of the state of Missouri, where default is made by appellant, to do other than affirm the judgment of the justice or dismiss the appeal.

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"Wherefore, petitioners herein pray that the said judgment by default be set aside and that they be granted a hearing in this cause.

"C. DOUGHERTY.

"State of Missouri, } ss
City of St. Louis. }

"C. Dougherty, being duly sworn, upon his oath states that the facts and matters set forth in the foregoing are true to the best of his information and belief.

"C. DOUGHERTY.

"Subscribed and sworn to before me this 18th day of May, 1914.

(Seal) "W. G. CARPENTER,
"Notary Public."

It is contended by the defendants that the lower court ought to have set aside the judgment rendered by it on the ground that the same was due to a mistake in defendants believing that they had employed counsel and in counsel believing that he had not been employed, and that all of the defendants had good and valid defenses to the note sued on, and that the court, in overruling said motion, abused its discretion. The defendants further contend that the circuit court was not warranted in hearing the case and rendering a judgment upon the failure of the defendants to appear, but ought simply to have dismissed the appeal or affirmed the justice's judgment, it appearing that the judgment of the circuit court was some $89.10 more than the judgment procured by the plaintiff in the justice's court.

The defendants have presented the case in this court as if the judgment, of which they complain, was a default judgment. Strictly speaking, the judgment rendered in the circuit court on April 20, 1914, was not a default judgment. [Armstrong v. Elrick, 177 Mo. App. 640, 160 S. W. 1019; Halsey v. Meinrath, 54 Mo. App. 335.] While the judgment is not a default judgment, the defendants defaulted in appearance

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to the trial. In order for the trial court to set aside such judgment, upon motion, it was necessary for defendants to show: First, that they had good reason for failing to appear at the time judgment was rendered; and second, that they had meritorious defenses; and the matter is largely in the discretion of the trial court, and this court can interfere only where it clearly appears that the trial court has abused its discretion.

In Parks v. Coyne, 156 Mo. App. l. c. 391, 137 S. W. 335; it is said:

"The authorities in this State are unanimous that in order to justify a trial court in setting aside a judgment by default, the defendant must show (1) that he has good reason for the default, and (2) that he has a meritorious defense, and that both these things must appear so clearly as to make it manifest that the refusal of the trial court was arbitrary. [Robyn v. Publishing Company, 127 Mo. l. c. 390, 391, 30 S. W. 130; and case cited; Hoffman v. Loudon, 96 Mo. App. l. c. 189, 70 S. W. 162; Welch v. Mastin, 98, Mo. App. l. c. 277, 71 S. W. 109; Hart v. Handlin, 43 Mo. l. c. 171; Florez v. Uhrig's Adm'r., 35 Mo. l. c. 519.]"

In examining the defenses set forth in the motion of the defendants, we believe that some of them at least were meritorious. Certainly the defense that more had been paid upon the note than appeared from the indorsement thereon was a valid and meritorious one. Even though the plaintiff has died since the trial of this case, and the defendants would be incompetent to testify, as argued by plaintiff, it would not necessarily be impossible for the defendants to prove further payment upon the note in suit by other witnesses or other competent testimony. But, after much consideration, this court has reached the conclusion that it is unable to say that the trial court abused its discretion when it failed to set aside the judgment, because it does not fully and plainly appear that the defendants were warranted in believing that they had employed counsel to look after their interest, and it does not

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fully and clearly appear that defendants had good reason for not appearing at the trial.

The motion of each of the defendants, as set out heretofore, simply states that they employed or believed they employed W. G. Carpenter as their attorney to represent them, but that he, W. G. Carpenter, did not so understand that he was employed. No evidence was offered to the trial court on the subject, or, at any rate, none is preserved in the record. If, as a matter of fact, the defendants had employed an attorney, and he had neglected to look after the case, his neglect would have been their neglect. [Welch v. Mastin, 98 Mo. App. 277, 71 S. W. 109; Robyn v. Publishing Company, 127 Mo. l. c. 391, 30 S. W. 130; Gehrke v. Jod, 59 Mo. 522.] The motion states that the defendants believed or understood that they had employed Mr. Carpenter to look after their interest in said cause, but the defendants do not claim, either in their motion or elsewhere, that they had ever spoken with Mr. Carpenter with reference to representing them in this litigation; they do not state that they had retained him as their attorney; they do not state any facts in their motion or elsewhere in the record by which it could be determined that they were reasonable in their belief, or had reasonable grounds to believe that they had in fact consummated an arrangement by which Mr. Carpenter was to represent them. While the fact does not appear of record, Mr. Carpenter in his argument filed in this case, states that he did not represent the defendants in the justice's court, but that they were represented in the justice's court by other counsel. The facts upon which they based their belief that they were represented by Mr. Carpenter are not set forth, and they ought to have been plainly and fully set forth, we believe, in order that the trial court could determine whether they were justified in believing that they had retained Mr. Carpenter. Knowing Mr. Carpenter, as we do, to be a reputable lawyer of the St. Louis Bar, and it appearing that he, a lawyer, did not believe that he represented the defendants or was retained

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by them, we are the more inclined to believe that the facts, if they had been set forth, would possibly not warrant the defendants in believing that they had retained or employed Mr. Carpenter to look after their interests. It must clearly appear from the facts that the trial court abused its discretion in this class of cases. In the case of Muth Realty Company v. John C. Timmerberg, 178 Mo. App. 654, 161 S. W. 589, it was held that, where a defendant sought to set aside a judgment rendered in his absence, it was not sufficient for him to simply allege that he had a good and meritorious defense, but that he must set forth all the facts showing that he had a good and meritorious defense.

We believe, therefore, that, before we could say that the lower court abused its discretion in failing to set aside the judgment, the facts ought to have appeared, either in the motion or in the evidence, which would have disclosed that the defendants really were warranted in believing that they had employed or retained Mr. Carpenter. Especially is this true, as indicated above, when it appears from their own motion and affidavit that Mr. Carpenter did not believe that he was so retained or employed.

Especially, also, should all of the facts have been set up, in view of what is said in 23 Cyc., 934 and cases cited thereunder, where the following rule is announced:

"A defendant cannot ordinarily procure the setting aside of a judgment against him on the ground of his mistaken belief that he has obtained an attorney to protect his interests; he must see to it that the attorney understands and accepts the retainer; otherwise, his failure to see personally himself to the case is inexcusable." See, also, the following cases: Howell v. Glover, 65 Ga. 466; Finlayson v. American Acc. Company, 109 N. C. 196; Davis v. Darling, 20 Texas, 803.

It is further contended by the defendants that, upon their failure to appear in the circuit court, the court ought to have either dismissed their appeal or to have affirmed the judgment of the justice's court. We can-

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not agree with this contention. When the defendant's appealed from the justice's court and paid the filing fee in the circuit court, the circuit court then had jurisdiction of the cause and of the defendants, and when, thereafter, the plaintiff came into court, at the time of the setting of the case, the court had full jurisdiction over the subject matter and over all the parties. Upon the defendants failing to appear when the case was called, it was not only proper, but it was the duty of the court, to proceed to hear the evidence of the plaintiff, and to render judgment thereon.

The statute (section 7579, R. S. 1909) provides:

"Upon the return of the justice being filed in the clerk's office, the court shall be possessed of the cause and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the original summons or the service thereof, or on the trial, judgment or other proceedings of the justice or constable in relation to the cause."

It is true that section 7584, Revised Statutes 1909, provides that, where appellant fails to give notice of appeal at least ten days before the second term of the appellate court after the appeal is taken, the judgment should be affirmed or the appeal dismissed at the option of the appellee. But this statute is not intended to deprive, and does not deprive, the appellee of the opportunity, if he sees fit, to waive notice of appeal and enter his appearance in the circuit court, and of having the cause tried *de novo*. The purpose of serving notice of appeal upon the appellee is to confer jurisdiction on the circuit court over the person of the appellee, and if such jurisdiction is given by waiver of notice and entry of appearance on the part of the appellee, then the court has the same right to try the case *de novo* as it has to try any case of which it has original jurisdiction and in which all the parties are before the court.

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In Bartschat v. Downey, 172 Mo. App. l. c. 636, 155 S. W. 880, Judge ALLEN, speaking for this court, said:

"The service of notice of the appeal, however, was indispensable to the conferring of jurisdiction over the person of the appellee, unless waived by the voluntary appearance of the latter. [Drake v. Gorrell, supra; Rall v. Cummings, 117 Mo. App. 312, 93 S. W. 864.] That the notice was waived by appellee, by going to trial on the merits, there can be no doubt. Any act whatsoever which implies that the appellee is in the circuit court for general purposes constitutes a waiver of the notice of appeal and confers upon the court jurisdiction as to the person of appellee. [Lecper v. Carter, 137 Mo. App. 617, 119 S. W. 463; Ford v. Gray, 131 Mo. App. 240, 110 S. W. 692; Morgan v. Lumber Company, 105 Mo. App. 239, 79 S. W. 997; Payne v. Railroad, 75 Mo. App. 14; Parmerlee v. Williams, 71 Mo. 410; Page v. Railroad, 61 Mo. 78; Deathley v. Patter, 29 Mo. App. 222; Bates v. Scott, 26 Mo. App. 428.]"

In Wolf v. Coffin, 46 Mo. App. 190, a case which originated in a justice's court and was appealed to the circuit court, and in which no notice of appeal was given and no general entry of appearance made by plaintiff, the appellee, who appeared only for the purpose of filing a motion for affirmance of the judgment, the Supreme Court held that the judgment of the justice should be affirmed "if the appellee so elect. The duty to affirm the judgment under such circumstances is mandatory on the circuit court. It has no discretion but to enforce the statute. In the absence of such notice, and the appellee's failure or refusal to enter his appearance to the cause in the appellate court, the circuit court has no jurisdiction to enter any other judgment than that of affirmance or dismissal of appeal at the option of the appellee."

In Daugherty v. Perky, 177 S. W. 786, a case originating in a justice's court, and appealed to the

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circuit court, and later to the Kansas City Court of Appeals, the latter court, in its opinion, says:

"The giving of such notice [of appeal] is jurisdictional. The notice is analogous to a summons—is a statutory means by which the appellee is called upon to appear in the circuit court and submit himself to its jurisdiction. That court becomes possessed of jurisdiction over the cause by the filing of the transcript and papers by the justice, but acquires jurisdiction over the person of the appellee by the service of notice of appeal. Though jurisdiction of the cause has been lodged in the circuit court, jurisdiction of the person of the appellee must be obtained, either by service of the statutory notice or by his voluntary appearance in court."

Munley v. King, 40 Mo. App. 531, was a suit in replevin instituted before a justice of the peace and subsequently appealed to the circuit court, where the defendant, appellant, offered to dismiss his appeal but the court refused to permit this. When the case was called for trial, defendant declined further action and the court proceeded to hear testimony concerning the value of the property detained by defendant and damages sustained by plaintiff, and thereafter rendered judgment ordering defendant to return the property to plaintiff or that the latter have judgment against defendant for the value of the property as ascertained by the court. Defendant thereupon appealed to the Court of Appeals, insisting that the circuit court, in case that defendant declined to prosecute his appeal, could only render a judgment affirming the judgment of the justice and that the circuit court erred in hearing evidence as to the value of the property, and based his position on the section of the statute numbered 2273, Revised Statutes 1909, which is found in the General Code under the title of "Costs" and is as follows: "In all cases where an appeal from the judgment of the county court, probate court, or justice of the peace is not prosecuted by the appellant according to law, the judgment should be affirmed and the costs

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adjudged accordingly." The Court of Appeals discusses this section of the statute and concludes by saying (p. 535): "If the appellant in such case fails to prosecute the appeal according to law, then it would be the duty of the circuit court to make such judgment in the case as the law requires," thus holding that the circuit court is not limited to an affirmance of the judgment of the justice, where it has jurisdiction both of the cause and of the parties thereto.

To the same effect is the case of Carroll v. Hancock, 57 Mo. App. 228; and in Meitz v. Koetter, 51 Mo. App. 370, this court holds that the provision of the section now numbered 2273, Revised Statutes 1909, does not add anything to the statutory requirements in regard to the prosecution of appeals from justice's courts, the court saying that the phrase "according to law" in the statute manifestly means according to the statute law governing the appeal in the particular case.

In Riddle v. Gillespie, 67 Mo. 627, where the appellant had failed to give notice of his appeal from the judgment of the justice in due time, the Supreme Court held that the appellee had the right, if he saw fit, instead of taking an affirmance of the justice's judgment, to have the cause tried in the circuit court.

It is clear, therefore, from the foregoing authorities, that in case of appeal from a justice's court to the circuit court, when no notice of appeal is given by the appellant to the appellee, the latter has the right to demand an affirmance of the judgment of the justice or a dismissal of the appeal, if he sees fit to move therefor, but when the appellee voluntarily enters his appearance in the circuit court, the cause is then before the court and it has the power, under the statute, to try the case *de novo* and render such judgment as it may see fit.

In the case at bar, the appellee, when the case was called for trial in its regular order on the trial docket, announced himself ready, and thereby entered his appearance generally in the cause, and the circuit court

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thereupon became possessed of full jurisdiction of the cause and the parties thereto, plaintiff and defendants, and had the right, as it did, to proceed to hear the cause on trial *de novo* and to render such judgment as it saw fit. The judgment of the circuit court is, therefore, affirmed. *Reynolds, P. J.*, and *Allen, J.*, concur.

BLACKMER & POST PIPE COMPANY, Respondent, v. MOBILE & OHIO RAILROAD COMPANY, Appellant.

St. Louis Court of Appeals, December 30, 1916.

1. **COMMON CARRIERS: Interstate Commerce: Limitation of Liability as Insurer: Shipper's Knowledge.** Where the duly published tariffs of a carrier sets out two different rates for transporting an interstate shipment between two points, under the lower of which the carrier is not liable for breakage, a shipper who ships under the lower rate is conclusively presumed to know about the rates and the nonliability provision, and is precluded by such provision from recovering for breakage, in an action prosecuted on the theory that the carrier is liable as an insurer.

2. ———: ———: **Damage to Shipment: Negligence: Sufficiency of Evidence.** In an action against a carrier for damage to an interstate shipment of sewer pipes, alleged to have been caused by the carrier's negligence, evidence that the pipes were heavy and hard to break, that, when properly packed in cars, they will stand considerable rough handling and will not break while being carried over even greater distance than the pipes in question were carried, that, when the pipes in question were placed in the cars, they were carefully examined and found to be in good condition, that they were properly loaded in the cars, and that, when they arrived at the destination, approximately one-third of them were broken, *held* to warrant a finding that the pipes were damaged while in transit, as a result of the negligence of defendant or its connecting carriers.

3. ———: ———: ———: ———: **Evidence: Relevancy: Harmless Error.** In an action against a carrier for damage to an interstate shipment of sewer pipes, alleged to have been caused by the carrier's negligence, the consignee's foreman testified that he had looked after the unloading of all cars of pipe shipped by plaintiff to such consignee during the year of the shipment in question, and

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that, at various times, he had seen the carrier allow cars loaded with tile to bump into other cars and that it had permitted cars to bump into cars he was unloading. On cross-examination, he testified that he did not know whether any of the cars involved in this case were thus handled. *Held*, that, while the testimony of this witness was not distinctly confined to the cars involved in this case, nevertheless it was for the jury to give it such weight as it deserved, and, even if it were incompetent, under the circumstances of the case, its admission would not be reversible error.

4. **APPELLATE PRACTICE: Verdicts: Recovery Upon Wrong Counts: Harmless Error.** The petition, in an action against a carrier for damage to an interstate shipment, was in four counts; the first and third counting on the theory that defendant was liable as an insurer, and the second and fourth proceeding on the theory that defendant's negligence caused the damage. Plaintiff was not entitled to recover upon the insurance counts, but the trial court nevertheless submitted those counts to the jury, charging them that if they found for plaintiff upon those counts, they should return a verdict for defendant upon the negligence counts, or, if they should find for plaintiff upon the negligence counts also, their verdict thereon should be for nominal damages only. The verdict was for substantial damages upon the insurance counts and for nominal damages upon the negligence counts. *Held*, that, notwithstanding plaintiff was not entitled to recover upon the insurance counts, the judgment should not, in view of Secs. 1850 and 2082, forbidding reversals for errors not material, be reversed, since the jury found that defendant was negligent, and the method of computing damages being the same under either theory, the award upon the insurance counts would have been the amount awarded upon the negligence counts, had the jury not been limited to an award of nominal damages thereon, and the verdict was, therefore, in effect, a finding that plaintiff was entitled to recover upon the negligence counts the amount awarded upon the insurance counts.

Appeal from St. Louis City Circuit Court.—*Hon. Leo S. Rassieur,* Judge.

AFFIRMED.

R. P. & C. B. Williams for appellant.

(1) Filing of the rates with the Interstate Commerce Commission and furnishing copies thereof to the freight office is incontrovertible evidence of the existence of such rates, and the shipper is charged with notice thereof. Railroad v. Cisco Oil Mills, 204

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U. S. 449-451 (51 L. E. 562-563); Kellerman v. Railroad, 136 Mo. 188; Donovan v. Wells, Fargo & Co., 265 Mo. 313; Southern Railroad v. Carl, 227 U. S. 653; Railroad v. Hooker, 233 U. S. 97; Poor Grain Co. v. Railroad, 12 I. C. C. 470; Railway Co. v. Stone, 169 Mo. App. 122; Sutton v. Railroad, 159 Mo. App. 685; Great Northern Railroad v. O'Connor, 232 U. S. 508. From these authorities it follows that the court erred: (a) In admitting evidence that the plaintiff did not know of any other rate than the fourteen cent rate; (b) That no other than the fourteen cent rate was offered at the time of the shipment; (c) That witness did not know of the class rate of twenty-five cents per hundred pounds. (2) If there are two rates, substantially different, one at carrier's risk, the other at shipper's risk, this will uphold the contract for release; although the higher rate, as a matter of fact, is never used. Daveneck v. Railroad, 57 Mo. App. 555; McFadden v. Railroad, 92 Mo. 343. (3) When a bill of lading is issued by a railroad and delivered to the shipper, he is conclusively presumed to assent, in the absence of fraud, to the terms of the instrument. Kellerman v. Railroad, 136 Mo. 189; O'Bryan v. Kinney, 74 Mo. 125; Patterson v. Railroad, 56 Mo. App. 657; Railroad v. Cleary, 77 Mo. 634; Schneider v. Express Co., 63 Mo. 376; Donovan v. Express Co., 265 Mo. 291. (4) When the bill of lading recites that the rate charged is a reduced rate, the burden is on the shipper to show that the rate charged is not a reduced rate. Freeman v. Railroad, 138 Mo. App. 322. (5) The testimony of the manner of handling cars by the connecting carrier, other than cars in question, was irrelevant and immaterial. Jones on Evidence, sec. 140; Coal v. Railroad, 60 Mo. 229; Hepsley v. Railroad, 88 Mo. 354. (6) There was no evidence of negligence in handling the pipe by the railroad, and the court should have given instruction "D." (7) Where negligence is the ground of plaintiff's complaint, burden is on plaintiff to show negligence, and this burden at no stage of the proceeding shifts to defendant. Ecton v. Railroad, 125 Mo.

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App. 223; Haase v. Fish Co., 143 Mo. App. 42; Clark v. Railroad, 138 Mo. App. 424; Smith v. Railroad, 177 Mo. App. 275; Bockersman v. Railroad, 169 Mo. App. 172.

Dawson & Garvin for respondent.

Evidence as to the character and condition of the goods and the manner in which they are packed when delivered for shipment, and of the fact of their being badly broken when delivered by him at the end of the transit, and of the character and extent of the breakage may be such as to afford inferential evidence of negligence by the carrier, sufficient to take the case to the jury. Flynn v. Railroad, 43 Mo. App. 441; Witting v. Railroad, 101 Mo. 641; Bowring v. Railroad, 90 Mo. App. 325.

THOMPSON, J.—This is a suit for damages to sewer pipe shipped by the plaintiff over defendant's railroad. It was composed of a shipment of five cars, four cars being included in one bill of lading, shipped September 19, 1903, and one car in another bill of lading, shipped October 15, 1903, both shipments being from St.Louis, Missouri, to New Orleans, Louisiana. This is the third appeal in this case. The first appeal was by defendant. The case was reversed and remanded, the opinion being reported under the title of Blackmer & Post Pipe Company v. Mobile & Ohio Railroad Company, 137 Mo. App. 133, 119 S. W. 13. The second appeal was by the plaintiff and is reported under the title of Blackmer & Post Pipe Company v. Mobile & Ohio Railroad Company, 168 Mo. App. 22, 151 S. W. 164.

The petition is drawn in four counts, two counts upon the damage done to the cars included in each bill of lading. The first count is for damage to four cars of pipe, and is drawn upon the theory that the defendant failed to transport safely the pipe, as was its duty. In other words, drawn upon the common-law liability of a carrier as an insurer. The second count is for damages to the same four cars, and is drawn

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upon the theory that the defendant was negligent in the transportation of the pipe. The third count is in like terms of the first, upon the second bill of lading, for damages to one car of sewer pipe, based upon the theory that it was not safely transported, as was the duty of the defendant, arising from the common-law insurance liability. The fourth count is for the damage to one car of sewer pipe upon the second bill of lading, alleging that defendant negligently and carelessly handled the same in transit. There was a verdict for plaintiff on the first count for $385.59 and on the third count for $78.77, and for plaintiff on the second and fourth counts for one cent each.

The answer is a general denial and sets up the affirmative defense that the bills of lading under which the pipe was shipped recited that the rate charged for transportation to New Orleans was a reduced rate, and that the defendant would not be liable for breakage of the pipe, and that the plaintiff in consideration of the reduced rate on said cars of pipe did assume all risks for breakage of said pipe in transit, and so relieved this defendant, as well as all other carriers over whose lines said cars of pipe were carried, from liability for breakage, and that liability for damage to said pipe is especially excepted in said bills of lading.

The proof showed that the pipe was delivered at St. Louis, Missouri, to the Missouri Pacific Railroad Company, and it delivered its dray ticket or receipt for the pipe. This dray ticket was made out by the plaintiff and states on its face that the pipe was shipped at the risk of the plaintiff, and that it was to be delivered to the Mobile & Ohio Railroad Company. This dray ticket was delivered to the defendant company at its office in St. Louis and a bill of lading issued in lieu thereof. The bill of lading was prepared in the office of the plaintiff company on forms furnished by the defendant company, and it was written in the bill of lading by the plaintiff that the pipe should be carried at the risk of the plaintiff. The bills of lading, in the printed part, contained the following provision:

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"The rate named herein is a reduced rate given in consideration of the shipper entering into the contract set out below. If the shipper elects not to accept the said reduced rate and conditions, he should notify the receiving agent in writing at the time his property is offered for shipment, and if he does not give such notice, it will be understood that he desires the property carried subject to the bill of lading conditions in order to secure the reduced rate authorized. The property not subject to these conditions of this bill of lading will be at carrier's liability, limited only as provided by common law, and the laws of the United States and of the several States in so far as they apply. The property thus carried will be charged twenty per cent higher, subject to minimum increase of one cent per hundred pounds than if shipped subject to the conditions of this bill of lading."

And said bill of lading further provides:

"In consideration of all of which and especially of said reduced rate, the shipper agrees that every service to be performed by the company hereunder shall be subject to all the conditions herein, all of which the shipper accepts and agrees are just and reasonable."

And it further provides:

"No carrier or parties in possession of all or any of the property herein described shall be liable for any loss thereof or damages thereto by causes beyond its control, . . . or by leakage, breakage, chafing."

And the bill of lading concludes, paragraph 14, as follows:

"In accepting this bill of lading the shipper, owner and consignee of the goods, the holder of the bill of lading, agrees to be bound by all of its stipulations, exceptions and conditions, whether printed or written."

The plaintiff offered evidence tending to show that the sewer pipe involved in both shipments was in good sound condition at the time it was loaded into the cars and was billed, marked and consigned for shipment to Louisiana, and that the pipe was properly loaded into the cars, and that when these cars were delivered at New Orleans, Louisana, they were in damaged condition

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—that is to say, the pipe therein was broken and damaged. The freight bill was paid in New Orleans and the cars unloaded there, the rate on the bills being fourteen cents. The defendant introduced, without objection from the plaintiff, a certificate from the Secretary of the Interstate Commerce Commission. This certificate set out the rules of classification adopted by the railroad and tariffs on file with the Interstate Commerce Commission. These tariffs show that: "Pipe, viz: Earthen and concrete (pipe or tile) same C. L." was put in class A. This certificate further shows that the joint freight tariff, I. C. C. No. 2810, filed February 26, 1903, and in force at the time of these shipments provided for a rate from St. Louis, Missouri to New Orleans, Louisiana, in connection with the New Orleans & Northeastern Railroad on class A merchandise of twenty-five cents per hundred pounds. The same tariff on file with the Interstate Commerce Commission provided for a "commodity" rate of fourteen cents per hundred pounds, with the following stipulation known as Rule 5:

"Whenever commodity rates are shown they are intended to apply on shipments made at owner's risk and released. The rates on the same commodities if shipped at carrier's risk, will be regular rates as per classification."

These classifications and rates were shown by the introduction in the evidence by the defendant, without any objection on the part of the plaintiff, of certain extracts from tariffs filed with the Interstate Commerce Commission prior to the dates of the shipments involved in this case, and which were in force and effect at that time, and spoken of in the evidence as Classification No. 140, I. C. C. 2523, filed October 27, 1902, and extracts from Mobile & Ohio Railroad joint freight tariff I. C. C. No. 2810, filed February 26, 1903. The evidence was all one way that these tariffs were filed and posted according to law.

At the close of the evidence the defendant offered instructions in effect advising the jury that the plain-

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tiff was charged with notice of the contents of the tariffs on file with the Interstate Commerce Commission, and also advising the jury that, at the time the care were shipped there were two rates on sewer pipe from St. Louis, Missouri to New Orleans, Louisiana, one a twenty-five cent rate and the other a fourteen cent rate. These instructions the court refused to give, and on its own motion gave the following instruction:

No. 10.

"The court instructs the jury that if they believe from the evidence that defendant, at the time of the shipment in question, had two rates on sewer pipe from St. Louis to New Orleans, under one of which rates the pipe was to be carried by the defendant at the risk of the shipper, being a lower rate, and under the other rate the pipe was to be carried at the risk of the defendant, then said provision in the contract of shipment (the bill of lading) that the defendant should not be liable for breakage is valid and binding, and if the jury so find the facts to be and further find and believe from the evidence that the plaintiff knew that there were such two rates and accepted said lower rate, then said defendant would not be liable for the breakage of said pipe while being transported from St. Louis to New Orleans, unless the jury should further find from the evidence that such breakage was caused by the negligence and carelessness of defendant in handling said shipments."

It was conceded in the lower court and also in this court by both sides that if the defendant had in force a twenty-five cent and a fourteen cent rate on sewer pipe from St. Louis, Missouri to New Orleans, Louisana, at the time of these shipments, the defendant, under the bills of lading and under the tariff rules introduced in evidence, would not be liable as an insurer—that is, would not be liable on counts one and three of plaintiff's petition—but that if defendant or its connecting carriers were guilty of negligence in the transportation of the sewer pipe, it would still be li-

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able for negligence on counts two and four. In other words it is conceded that the defendant could by means of a special contract based upon a reduced rate exempt itself from liability as an insurer, but could not so exempt itself from negligence.

The appellant contends that the above instruction number 10, was erroneous in that it allowed the jury to pass upon the question as to whether, if there were two rates, the plaintiff knew of them. In this contention we believe that the appellant is correct. Under the tariffs mentioned above, which were introduced without objections and without dispute as the tariffs under which these shipments moved, there were two rates upon sewer pipe, one a classification rate of twenty-five cents and the other a commodity rate of fourteen cents. The plaintiff was bound to know of these rates, and should not have been able to say that there were not two rates, or that it did not know of the two rates.

In the case of Kansas City Southern R. R. v. Carl, 227 U. S. l. c. 653, the court says:

"The shippers knowledge of the lawful rate is conclusively presumed."

In the case of Poor Grain Company v. Railroad, 12 I. C. C., l. c. 470, Commissioner HARLAN, delivering the opinion, says:

"The carrier is required by the law to publish the rate and also to clearly indicate the route over which the published rate is applicable. When so published the rate named and the route designated stands as the law, binding as well on the shipper as upon the carrier. The schedule of rates published in the manner provided by law speaks with equal authority to the shipper and the carrier, and both are equally chargeable with notice of the rate and of the route over which the rate is made applicable."

In the case of Texas & Pacific R. R. Co. v. Cisco Oil Mill, 204 U. S. l. c. 451, the court says:

"The filing of the schedule with the commission and and the furnishing by the railroad company of copies

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to its freight offices incontrovertibly evidences that the tariff on rates contained in the schedules had been established and put in force as mentioned in the first sentence of the section, and the railroad company could not have been heard to assert to the contrary."

In the case of Boston & Maine R. R. v. Hooker, 233 U. S. l. c. 113, the court says:

"The precise position of the defendant is that as the limitation of liability for baggage was filed and posted as a part of its schedules for passenger tariff, the limitation thereby became and was an essential part of its rate, from which under the interstate commerce law it could not deviate, and by which the plaintiff was bound, regardless of her knowledge of or assent to it. If the premise is sound, then the conclusion follows, for the public are held inexorably to the rate published, regardless of knowledge, assent or even misrepresentation. . . .

"It follows therefore, from the previous decisions in this court, that if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation. Having the notice which follows from the filed and published regulations, as required by the statute and the order of the Interstate Commerce Commission, she might have declared the value of her luggage, paid the excess tariff rate and thus secured the liability of the carrier to the full amount of the value of her baggage."

The Boston & Maine case was followed in the case of Donovan v. Wells, Fargo & Company, 265 Mo. 291. In this latter case, at page 316 the court says:

"So we think it fairly follows that where in an interstate shipment an oral contract is made, the terms of which are forbidden by law, which the shipper and the carrier must both notice, and where a published interstate rate is filed, containing regulations prescribing conditions precedent to the acceptance of goods for carriage, he who delivers such goods at the owner's request for shipment must be held to be au-

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thorized by the owner to comply with the law, and with all reasonable published regulations as to the terms and conditions of shipment, and that the shipper will not be heard to assert to the contrary."

To the same effect, see the recent case of Stubblefield v. St. Louis & San Francisco Railroad Company, 184 S. W. 149.

It follows from what has been said above that the court should not have allowed the jury to pass upon whether or not the plaintiff knew of the existence of the two rates, because as a matter of law, plaintiff was bound to know of the existence of the rates provided for in the tariffs. Indeed, under the law and undisputed evidence in this case, the jury ought to have been told that the plaintiff was not entitled to recover on counts one and three.

The appellant contends that the plaintiff was not entitled to recover on counts two and four, for the reason that there was no evidence of negligence on the part of the defendant. We cannot agree with appellant in this contention. At the trial the plaintiff offered evidence tending to show that all of the tile placed in the car at St. Louis was carefully examined and found to be in good sound condition, that it was properly loaded into the cars for shipment from St. Louis, Missouri to New Orleans, Louisiana. It appears that this sewer pipe is heavy and hard to break, and that when it is properly packed in cars it will carry over a distance such as the one involved in this case. The evidence further shows that, while in the cars so packed, it will stand considerable rough handling and not break. It further appears from the evidence that plaintiff had shipped great numbers of cars containing the same kind of tile as was contained in these cars, over similar distances and even greater distances, and at destination the tile or sewer pipe was found to be in like good order and condition as when shipped. It appears in this case that upon the delivery of these cars at New Orleans, Louisiana, approximately one third of the sewer pipe was broken. We believe that from this evidence

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the jury was warranted in drawing the conclusion that the sewer pipe was damaged by the negligence and carelessness of the defendant or its connecting common carriers while in transit.

In Heck v. Mo. Pac. Ry. Co., 51 Mo. App. 533, 534, plaintiff sued defendant for breaking and damaging a certain leather-splitting machine. Judgment was given for plaintiff, on a trial without a jury, and defendant appealed. The court said:

"It appeared from the testimony, or, to be more accurate, there was testimony going to show that the machine was deliverd to defendant for shipment in sound condition and well and securely packed, and that it arrived at its destination with the legs broken. There was a special contract exempting defendant from liability in certain instances named, and we will assume that such exemption included machinery such as this was. We will also assume as true a matter about which there was contention between the parties, that the letters indorsed on the freight contract were 'O. R,' and were known to plaintiff. Defendant offered evidence going to show that the car in which the machine was placed was properly and carefully handled, that it received no rough handling and that no accident happened to it. The case is then left to stand with the onus on plaintiff throughout and with the testimony above stated; and the only question is, does it make such a case as should be submitted to the triers of the facts? We answer this in the affirmative. When the plaintiff delivered the machine to defendant in good condition, well and securely packed, and it was delivered by defendant at St. Louis with broken legs, it was circumstantial evidence from which a reasonable inference of negligence on defendant's part while the machine was in its charge as a carrier could be drawn. It was evidence for the court (trying the case as a jury) to consider in connection with defendants testimony, as to the care taken, etc. That consideration has resulted in plaintiff's favor, and we do not feel authorized to disturb it. This case is similar (though stronger for this plaintiff) to the

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case of Witting v. Railroad, 101 Mo. 631. As stated in that case, the onus, in cases of this sort, is on the plaintiff throughout the trial to prove negligence of defendant; and, though such negligence will not be presumed, it may be inferred from circumstances legitimately appearing in the case. The judgment is with the concurrence of all affirmed."

In the case of Witting v. St. Louis & San Francisco Railroad Company, 101 Mo. 631, 14 S. W. 743, it is said:

"There is evidence tending to show that the fountain was properly packed, and was delivered to the defendant in good order. It was badly broken when placed in the defendant's warehouse at St. Louis. The evidence of plaintiff and his brother is, that the crate was then broken on one side, and that one of the inside stays was broken and the others out of place. All this tends to show want of care on the part of defendant. Had the plaintiff brought this suit in the circuit court by declaring on the contract, setting out its provisions, and founding his case of negligence only, we think the evidence would have entitled him to go to the jury. It will not do to say the evidence shows no more than the simple fact that the apparatus was broken. The very circumstances which disclose this fact tend to show very great negligence on the part of the defendant. It is enough for the plaintiff to disclose circumstances sufficient to raise a fair inference of negligence. We can say with safety that such a breakage does not ordinarily occur where the property is transported with due care. There is an abundance of evidence to entitle the plaintiff to go to the jury on the issue of negligence, and especially is this so, since the means of showing how the accident occurred is with the defendant and not the plaintiff."

Complaint is here made that the court allowed in evidence certain testimony of a foreman in the employ of the consignee at New Orleans, Louisiana, who testified that he unloaded all or looked after the unloading of all cars of pipe shipped in 1903 from plaintiff to the

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consignee, being four or five hundred all together, and that at various times he would see the railroad switch cars loaded with tile around the yard and allow them to bump into other cars, and that the railroad would bump into cars that he was unloading. Upon cross-examination he testified that he did not know whether the cars thus handled were any of the five cars involved in this case. The testimony of this witness with reference to these cars is not distinctly confined to the cars involved in this case, but the witness was thoroughly cross-examined with reference to it, and we believe that it was for the jury to give such weight to it as it deserved, and even if the evidence was incompetent, under the circumstances of this case, we do not believe that its admission was reversible error.

On the measure of damages, the court instructed the jury to the effect that if they found in favor of the plaintiff on the first and third counts, they should assess plaintiff's damages based upon the difference, if any, in the market value of the sewer pipe at St. Louis in the condition it was shipped and its condition in which it was delivered at New Orleans, and the jury were further instructed that, in that event, they would find for the defendant on the second and fourth counts of the petition, or if they did find for plaintiff on those counts also, then their verdict would be for nominal damages only on those counts. As indicated above the jury found in favor of the plaintiff in the first count for $385.59 and on the third count for $78.77, and they further found the issues in favor of the plaintiff on the second and fourth counts and assessed its damages at one cent on each of these counts.

We have heretofore reached the conclusion that under the evidence in this case, the plaintiff ought not to have been allowed to recover on the first and third counts, that is, under the insurance liability of the defendant as a common carrier. It is evident, however, from this verdict that the jury reached the conclusion that the plaintiff was entitled to recover on the second and fourth counts, that is was entitled to

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recover upon the liability of the common carrier for negligence, because the instruction on the measure of damages told the jury that if they found in favor of the plaintiff on the second and fourth counts, their verdict should be only for nominal damages in the event they found substantial damages on the first and third counts.

It will be remembered that under the pleadings in this case and the theory of both sides, the measure of damages in the event plaintiff was to recover was, by the terms of the bill of lading, to be computed on the difference in value of the good and broken pipe at the time and place of shipment, and the measure of plaintiff's recovery on any of the four counts was exactly the same, as was set forth in the instruction on the measure of damages. In other words the measure for a recovery for substantial damages was the same for count one as for count two, and the same for count three as for count four.

Under this instruction the jury found for the plaintiff on the first and third counts and assessed the actual damages on those counts. They also, at the same time, found for the plaintiff on the second and fourth counts for nominal damages. By this verdict on the second and fourth counts, the jury in reality found that the defendant was negligent in the transportation of the sewer pipe. But the jury could not assess the actual damages also under those counts because they had already assessed it under the first and third counts. They had computed this actual damage for the first and third counts, using a correct method for this case. This method for computing the actual damages, set forth in the instructions, was also the proper method for computing the actual damages in this case if the jury were to return a verdict for actual damages on the second and fourth counts for negligence of the defendant. So we have here a finding by the jury that plaintiff is entitled to recover on the second and fourth counts, because defendant was guilty of negligence. We have the amount of the actual damages suffered and

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sustained by reason of this negligence, because the amount of the actual damages had to be the same under the instruction for the first and second counts, and also the same for the third and fourth counts, and, therefore, when we have the damages for the first count assessed by the jury, we necessarily have the damages sustained under the second count, and when we have the damages for the third count, assessed by the jury, we necessarily have the damages sustained under the fourth count. The finding of the jury was in effect, therefore, that the plaintiff was entitled to recover for the negligence of defendant on the second count the amount found and assessed by it on the first count, and on the fourth count for the amount found and assessed by it on the third count. Holding this view of the case it is our duty to allow the judgment to stand. [Hamilton-Brown Shoe Company v. Wolff, 240 U. S. 251. Sections 2082 and 1850, R. S. Mo. 1909.]

The judgment is affirmed. *Reynolds, P. J.*, and *Allen, J.*, concur.

SUNDERLAND BROTHERS COMPANY, Appellant, v. BALTIMORE & OHIO SOUTHWESTERN RAILROAD COMPANY, Respondent.

St. Louis Court of Appeals, December 30, 1916.

1. **COMMON CARRIERS: Interstate Commerce: Illegality of Freight Rate: Jurisdiction of State Courts.** A complaint based upon the illegality or impropriety of the published freight rate for an interstate shipment is not within the jurisdiction of the State courts.

2. **———: ———: Excessive Charges: Jurisdiction of State Courts.** Where a railroad company wrongfully exacts a freight charge for a shipment, in excess of the rate it advertises in its tariff sheets, a cause of action by the shipper to recover the excess is within the jurisdiction of the State courts, although the shipment is an interstate one.

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3. ———: ———: ———: **Long and Short Haul Clause: Tariff Construed.** Where the tariff sheet of a railroad company named freight rates from two points on its line to a common destination, within the same State, the higher rate being charged for the shorter haul, the further clause appearing in the sheet, that "on interstate traffic a higher rate must not be charged for a shorter than a longer distance over the same line, the shorter being entirely included within the longer distance," did not affect the named rates, and was not an offer to transport a shipment consigned to a point in another State, from the farther point to such common destination, at the same rate charged from the point nearer the common destination, so as to authorize a recovery by a shipper for the difference between the two rates.

4. ———: ———: **Laws to be Read into Tariff Sheets.** The pertinent provisions of the Interstate Commerce Act are to be read into tariff sheets filed by carriers, relating to interstate shipments, and the State laws touching the matter become an integral part of such sheets, if applied to intrastate shipments.

5. ———: ———: **Contract for Less than Established Rate.** A carrier may not, under the law, by special contract with a shipper or otherwise, bind itself to deviate from the established rate for an interstate shipment, duly promulgated and in effect.

Appeal from St. Louis City Circuit Court.—*Hon. Wilson A. Taylor,* Judge.

AFFIRMED.

Richard A. Jones and *McGilton, Gaines & Smith* for appellant.

Fordyce, Holliday & White and *Kramer, Kramer & Campbell* for respondent; *Edward Barton* of counsel.

ALLEN, J.—This is an action, instituted in the circuit court of the city of St. Louis, to recover certain alleged "overcharges" of freight on coal shipped by plaintiff over defendant's line of railway. The cause, being one for compulsory reference, was referred to Edgar R. Rombauer, Esq., of the St. Louis Bar, to try all of the issues. The referee duly filed his report, stating his findings of fact and conclusions of law, and recommending judgment for defendant. To this report plaintiff filed exceptions, which were overruled.

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The court thereupon entered judgment for defendant, in accordance with the recommendation of the referee, and plaintiff appealed to this court.

Plaintiff is a corporation of the State of Nebraska. Its corporate name was originally "Omaha Coal, Coke & Lime Company," but this was subsequently changed to "Sunderland Brothers Company." The defendant is a corporation of the State of Ohio, doing business as a common carrier in various States, and engaged in operating its railroad in the State of Illinois through the towns of Breese and Trenton, to East St. Louis, all being points within the last mentioned State. During 1900 and 1901 plaintiff made certain shipments of coal over defendant's railroad from Trenton to East St. Louis, destined for points beyond the State of Illinois, to-wit, points in States lying to the northwest thereof. Breese, Illinois, is a point on defendant's line of railway approximately eight miles east of Trenton, the latter being thirty-six miles east of East St. Louis. Consequently shipments from Trenton to East St. Louis were made over the same line of defendant's road, and in the same direction, as shipments from Breese to East St. Louis; that from Breese being the longer haul.

During the period in which plaintiff made the shipments with which we are now concerned, the defendant had in effect a tariff from Trenton to East St. Louis, shown by a certain tariff sheet, in evidence, issued by defendant on January 1, 1900. We deem it unnecessary to set out this tariff sheet in full. It applied on coal, in carload lots, "minimum 20 tons." It sets out the names of a number of stations on defendant's line of railway east of East St. Louis, and designates the freight rates on coal (carloads, minimum 20 tons) from said points to East St. Louis. The rate appearing therein on coal from Trenton to East St. Louis is 40c per ton, while the rate named on coal from Breese to East St. Louis is 35c per ton. Following the names of the various stations, with the respective rates on coal as aforesaid, the tariff sheet contains the words: "Subject to rules

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of classification." Then follows this clause, viz: "On interstate traffic a higher rate must not be charged for a shorter than a longer distance over the same line in the same direction, the shorter being entirely included within the longer distance."

Other tariff sheets of defendant were introduced in evidence by plaintiff; but as the case was tried before the referee, as shown by his report, plaintiff ultimately confined its claim to shipments made during the time when the above mentioned tariff sheet was in effect. The referee found that during that period plaintiff shipped over defendant's line of railway from Trenton to East St. Louis, 14,332.26 tons of coal in carload lots, each car containing a minimum of twenty tons thereof, the points of ultimate destination of such shipments being beyond the State of Illinois. On each such shipment the defendant charged the sum of forty cents per ton freight, which was paid by plaintiff, i. e., the carrier or carriers that made delivery at the points of ultimate destination collected the freight from plaintiff vendees, who deducted the same in remitting to plaintiff. Plaintiff's claim, now in controversy, is, therefore, for the recovery of five cents per ton alleged excess freight collected by defendant on these shipments, amounting to $716.61; plaintiff contending that on such shipments defendant could lawfully charge and receive only 35c per ton.

It is unnecessary to here notice the pleadings. The learned referee proceeded upon the theory that plaintiff's complaint was not founded upon the assumption or contention that defendant's rates, published in its aforesaid tariff sheet, were illegal or improper, but that plaintiff asserted a right of recovery upon the ground "that it contracted with defendant on a published rate, for this carriage, of 35c, and that defendant, in violation of its contract obligations to carry for 35 cents, exacted a charge of forty cents for the service." And the referee held that in any event, as the shipment was an interstate one, any complaint based upon the illegality or impropriety of the published rate

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would not be within the jurisdiction of the trial court. This ruling we regard as entirely sound; and hence we shall not assume the right to pass upon any question —whether apparently included within the petition or otherwise—touching the reasonableness of the rate charged and collected, or the legality of such rate under the Interstate Commerce Act. The rate on coal of 40c per ton from Trenton to East St. Louis, appearing on the same tariff sheet with a rate on coal of 35c per ton for the longer haul, in the same direction, from Breese to East St. Louis, when applied to an interstate shipment, is apparently in contravention of section 4 of the Interstate Commerce Act of 1887 (24 Stat. L. 380; Vol. III, Fed. Stat. Ann., p. 823). But the prohibition of that section is directed against "the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance." There is evidence to the effect that the coal mined at Trenton, to which the rate of forty cents per ton apparently applied, was a comparatively high grade coal, used for domestic purposes and sold over an extensive territory, whereas the coal mined at and shipped from Breese was of a lower grade, used principally as "steam coal" and generally "sold locally along the line (of defendant's railway) and in St. Louis;" and that, while the price of each at the mine varied from time to time, the Trenton coal was worth from fifty cents to seventy-five cents more per ton than the Breese coal. But whether the difference in the character and value of the two coals, or other circumstances and conditions present, were such as to justify a classification placing a higher rate on Trenton coal from Trenton to East St. Louis and on Breese coal from Breese to East St. Louis, in interstate shipments, is a matter with which we have here no concern. It is quite clear, as stated by the referee, that, if any question of this character can be said to have been originally presented in the case, the lower court had no

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jurisdiction to determine it. [See Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U. S. 426; Robinson v. B. & O. Railroad Co., 222 U. S. 506.] Plaintiff contends, however, that by the tariff sheet aforesaid the defendant advertised and offered to transport coal from Trenton to East St. Louis, on interstate shipments, at the rate of 35c per ton; whereas, upon interstate shipments tendered by plaintiff and accepted by defendant, while such tariff sheet was in force and effect, defendant, in violation of its contract obligations in the premises, wrongfully exacted a freight charge of 40c per ton for such carriage. The cause of action thus counted upon is undoubtedly within the jurisdiction of our State courts. [See Pennsylvania Railroad Co. v. Puritan Coal Mining Co., 237 U. S. 121; Illinois Central Railroad Company v. Mulberry Hill Company, 238 U. S. 275.]

The question, therefore, with which we are concerned is whether defendant, through its published tariff sheet, when construed as a whole, should be held to have offered to carry coal from Trenton to East St. Louis at the rate of 35c per ton, in interstate traffic. The tariff sheet definitely specifies a rate of 40c per ton from Trenton to East St. Louis. It is not stated whether this is to apply to interstate or intrastate shipments, or both. However, the tariff sheet recites that "on interstate traffic a higher rate must not be charged for a shorter than a longer distance over the same line in the same direction, the shorter being entirely included within the longer distance;" and inasmuch as the rate named from Breese to East St. Louis is 35c, plaintiff argues that when the tariff sheet as a whole is construed it must be taken to mean that on interstate shipments the rate from Trenton to East St. Louis is to be 35c. It is pointed out that only in this one instance does the tariff sheet, in the column of rates, specify a greater rate for a shorter than for a longer distance; and it is insisted that by inserting the clause above quoted, it was plainly indicated and intended that on interstate shipments from Trenton to East St.

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Louis the specified rate from Breese to East St. Louis, viz., 35c per ton, would apply.

In this connection it is to be observed that a statute of the State of Illinois, shown in evidence, and which was in force at the time with which we are here concerned, makes it an offense for a railroad corporation to charge, collect or receive "for the transportation of any passenger, or freight of any description, . . . the same or a greater amount of toll or compensation than is at the same time charged, collected or received for the transportation in the same direction of any passenger or like quantity of freight of the same class, over a greater distance of the same railroad." [See 3 Star & Curtis Ill. Stat. Ann., sec. 166, *et seq.*, chap. 114, p. 3309 *et seq.*] Appellant contends that the scope of this statute is considerably different from that of the corresponding provisions of the Interstate Commerce Act. But be this as it may, the tariff sheet above mentioned, specifying a 40c rate from Trenton to East St. Louis and at the same time a 35c rate from Breese to East St. Louis, if intended to apply to intrastate shipments, is apparently in contravention of this statute; just as it appears prima facie to be in contravention of the Interstate Commerce Act, if applicable to interstate shipments. And in this connection the referee pertinently says:

"Whether such apparent disregard of the law is justified or not by the difference in the grades of coal, and whether the defendant, if it had the right to make a different classification, did or did not make such classification, is not now the question. The sole question is did the defendant, by this tariff sheet, offer to carry plaintiff's coal for interstate shipment for 35 cents a ton, from Trenton to East St. Louis? If such construction is placed upon the tariff sheet, then it would be just as logical in view of the Illinois statute to place a similar construction thereon as to intrastate shipments, a construction that would eliminate the forty cent rate from the tariff sheet altogether."

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It is true that the tariff sheet makes no reference to the Illinois statute, while it does contain a clause calling attention, in a general way, to the above mentioned prohibition of the Interstate Commerce Act. But we take it that it matters not that the tariff sheet made reference to the Federal law and not to the State law. Necessarily the pertinent provisions of the former are to be read into the tariff sheet if applied to interstate shipments, and, on the other hand, the State law touching the matter must become an integral part of the tariff sheet if applied to intrastate shipments. What defendant's object was in placing upon the tariff sheet the clause mentioned, referring to the provisions of the Interstate Commerce Act, we cannot say. In our opinion that clause added nothing whatsoever to the tariff sheet. That document plainly specifies a rate of 40c per ton on coal from Trenton to East St. Louis. And this we think cannot be said to have been eliminated or altered by the mere recital therein that on interstate traffic a higher rate must not be charged for a shorter than a longer distance over the same line in the same direction, the shorter being entirely included within the longer distance.

We are therefore of the opinion that the tariff sheet in question cannot be construed as an offer by defendant to transport coal from Trenton to East St. Louis at the rate of 35c per ton. If defendant was not justified under the law in fixing the rate at 40c per ton, as specified, in interstate shipments, the matter is one which cannot be reached in this action.

It is contended that defendant, by certain acts on its part, placed a construction on the tariff sheet such as that for which plaintiff contends, and should now be held to that construction. It is unnecessary to review these matters in detail, as to which there is considerable argument *pro* and *con*. It is sufficient to say that defendant is at any rate correct in the contention that under the law it could not, by special contract with plaintiff or otherwise, bind itself to deviate from the established rate duly promulgated and in effect during

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the period mentioned. [See Dunne and Grace v. Railroad, 166 Mo. App. l. c. 377, and cases cited, 148 S. W. 997.]

It follows that the judgment should be affirmed, and it is so ordered. *Reynolds, P. J.*, and *Thompson, J.*, concur.

LUCINDA HICKS, Respondent, v. METROPOLITAN LIFE INSURANCE COMPANY, Appellant.

St. Louis Court of Appeals, December 30, 1916.

1. **LIFE INSURANCE: Failure to Attach Application to Policy: Effect.** Where the application for a life insurance policy is not attached to the policy, nor the substance thereof endorsed thereon, conformably to Sec. 6978, R. S. 1909, a defense predicated upon alleged misrepresentations made by insured in the application is not available to insurer, in an action on the policy.

2. ———: **Policy Provisions: State of Health of Insured at Issuance of Policy: Statute.** A provision in a life insurance policy, that no obligation is assumed by insurer, unless, on the day of the issuance of the policy, insured was in sound health, is governed by Sec. 6937, R. S. 1909, so that such provision is unavailing to defeat the insurance, unless it appear that, at the time of the issuance or delivery of the policy, insured was afflicted with the disease which caused, or contributed to cause, his death, and whether or not such was the fact is a question for the jury, unless it be foreclosed by an admission of the plaintiff, which is wholly unexplained or unrepelled by any other evidence.

3. ———: ———: ———: **Question for Jury.** In an action on a life insurance policy, insurer defended on the theory that insured died from a malady with which she was afflicted at the time the policy was issued, and that, inasmuch as the policy provided that no obligation was assumed by insurer, unless, at the time of the issuance of the policy, insured was in sound health, the policy never became effective. The certificate of the physician who attended insured during her last illness, filed by the beneficiary as a part of the proofs of death, stated that insured had been suffering from the disease which caused her death, for several years prior to the date upon which the policy was issued. A sworn statement of the beneficiary, also filed as part of the proofs of death, alleged that the

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duration of the last illness was about two months. The report of insurer's medical examiner showed that he found insured to be in good health and that he recommended her as a first class risk. Testimony was also adduced tending to show that insured appeared to be in good health at the time the policy was issued. *Held*, under the evidence, that the defense was not conclusively established, and hence, under Sec. 6937, the question was for the jury.

4. **WITNESSES: Privileged Communication: Waiver.** Where a physician was placed on the stand by defendant, and, after its counsel had asked him a few preliminary questions, plaintiff's counsel interposed a general objection and then obtained permission to question him and propounded to him certain questions, plaintiff did not thereby waive the privilege granted by Sec. 6362, R. S. 1909, since her counsel sought merely to lay a foundation for his objection to the competency of the witness, later more fully made.

5. **LIFE INSURANCE: Witnesses: Privileged Communication: Waiver.** The beneficiary of a life insurance policy is bound by a distinct provision in the policy whereby insured expressly waives the benefits of all laws disqualifying a physician from testifying concerning any information obtained by him in a professional capacity and expresses the intention to have such waiver apply to any person who may have any interest in or claim under the policy.

6. ———: ———: ———: ———. The beneficiary of a life insurance policy does not waive her privilege to claim the incompetency of decedent's physician as a witness, under Sec. 6362, R. S. 1909, by filing the certificate of such physician as a part of the proofs of death, pursuant to a clause in the policy providing that proofs of death shall be made on blanks furnished by the company and shall contain answers to each question propounded to the claimant, physician and other persons, and that all the contents of such proofs shall be evidence of the facts stated in behalf of, but not against, insurer.

7. ———: **Evidence: Admissibility of Physician's Certificate.** A certificate of insured's physician, constituting part of the proofs of death, is admissible, in an action against the insurer, on the ground that the answers therein contained constitute admissions on the beneficiary's part, subject, however, to contradiction or explanation.

8. ———: **Penalty for Vexatious Refusal to Pay: Sufficiency of Evidence.** In an action on a life insurance policy, *held* that the evidence was sufficient to support an inference that insurer's delay was unwarranted and vexatious, within the meaning of Sec. 7068, R. S. 1909, so that an allowance of ten per cent. damages and an award of an attorney's fee were warranted.

9. **APPELLATE PRACTICE: Bill of Exceptions: Verity.** A bill of exceptions imports verity as it stands, and can alone be looked

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to by the appellate court concerning matters of exception, so that an assignment of error predicated upon a ruling, to which it is claimed an exception was duly saved, but which exception does not appear in the bill of exceptions, is not open for consideration by the appellate court.

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey,* Judge.

AFFIRMED.

Fordyce, Holliday & White and *W. R. Mayne* for appellant.

(1) The evidence in the case, coming directly or indirectly from the plaintiff herself and remaining uncontradicted and unexplained, conclusively establishes the fact that on the date of the policy and at the time of the application therefor, and for approximately eight years prior thereto, the insured was afflicted with a stricture of the rectum, also called tuberculosis of the rectum, and that said disease caused her subsequent death. Therefore, the demurrer to the evidence, at the end of the case, should have been sustained, and a verdict directed for defendant. (a) Proofs of death, furnished by the beneficiary to the insurance company, are prima-facie evidence of the facts therein stated, and are conclusive unless other facts are brought forward to explain them. Stephens v. Metropolitan Life Insurance Co., 190 Mo. App. 673 to 680 (St. L. 1915); Castens v. Supreme Lodge Knights and Ladies of Honor, 190 Mo. App. 57; Insurance Co. v. Newton, 89 U. S. 32, 22 Wallace 32; 3 Elliott on Evidence, sec. 3327; Hassencamp v. Life Insurance Co., 120 Fed. 475. (b) Since the insured was not in sound health at the date of the policy, and the disease with which she was then afflicted contributed to cause her death, there could be no recovery. R. S. 1909, sec. 6937; Stephens v. Metropolitan Life Insurance Co., 190 Mo. App. 673 to 679. (2) (a) The testimony of Dr. Vincent J. Mueller, offered by the defendant, was proper and competent and very material, and its exclusion was pre-

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judicial error, because any privilege affecting disclosures made to him by the insured was waived so far as they were connected with statements contained in the certificate of this physician furnished to the insurance company by the plaintiff, and in the certificate filed with the Bureau of Vital Statistics of the State of Missouri. Bolton v. Inter Ocean Life and Casualty Co., 187 Mo. App. 180; Western Travelers' Accident Association v. Munsion, 73 Neb. 867, 1 L. R. A. (N. S.) 1068; 4 Wigmore on Evidence, secs. 2388-2390. (b) Moreover, whatever privilege might have been available to plaintiff in this regard, was waived by her counsel's examination of the physician as to the dates when he treated insured professionally. Having elicited such testimony as was thought to be in her favor, plaintiff, could not set up the bar of professional privilege as to testimony which would be prejudicial to her claim. Epstein v. Railroad, 250 Mo. 26. (3) Far from showing that the refusal of defendant to pay the claim for this insurance was willful and without reasonable cause as the facts would have appeared to a reasonable and prudent man before the trial, the evidence and circumstances of this case, taken as a whole, establish on the contrary that claimant herself by her proofs of death furnished the ample reason for defendant's refusal. Under such circumstances, the jury should not have been allowed to award a penalty and attorneys' fees to plaintiff, as for vexatious refusal to pay. Weston v. Amer. Ins. Co., 191 Mo. App. 287; Patterson v. Amer. Ins. Co., 174 Mo. App. 44; Keller v. Insurance Co., 198 Mo. 460; Blackwell v. Insurance Co., 80 Mo. App. 78. (4) The action of the court in striking out from two instructions offered by defendant the clause, "regardless of whether or not said insured, Sadie Griffin, knew that said representations were not true in the respect aforesaid, if you find from the evidence that said representations were not true," was error, because a material representation of fact contributing to the maturity of the policy is fatal to any claim under the policy, whether such misrepresentation be made fraudu-

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lently or not. Burns v. Metropolitan Life Ins. Co., 141 Mo. App. 216. (5) The remarks of counsel for plaintiff in his argument to the jury, objected to by defendant, were so highly improper and inflammatory that counsel himself subsequently could not believe that he had been guilty of them. The action of the court in overruling defendant's objections thereto and in failing to rebuke counsel as requested was manifestly highly prejudicial to defendant's right to a fair trial, and to it may properly be ascribed the return of a verdict by the jury, so contrary to the clear weight of the evidence. Fathman v. Tumulty, 34 Mo. App. 241; Blyston-Spencer v. United Rys. Co., 152 Mo. App. 142; Bishop v. Hunt, 24 Mo. App. 377; Ensor v. Smith, 57 Mo. App. 596; Smith v. Western Union Tel. Co., 55 Mo. App. 626; Norton v. St. Louis & Hannibal Ry. Co., 40 Mo. App. 649.

James J. O'Donohoe for respondent.

(1) (a) The policy stipulates: "This policy contains the entire agreement between the company and the insured and the holder and owner hereof." Therefore, the application is no part of the policy. Besides, too, it forms no part of the policy for the further reason that it is neither attached to nor indorsed on the policy. Sec. 6978, R. S. 1909; Schuler v. Ins. Co., 191 Mo. App. 52; Coscarella v. Ins. Co., 175 Mo. App. 130. The policy provided that no obligation was assumed by defendant unless on the date of the policy the insured was in "sound health." It further provided that the policy was void if the insured had been attended by a physician for any serious disease or complaint; or has had before the date of the policy any pulmonary disease, or chronic bronchitis, or cancer, or disease of the heart, liver or kidneys. These stipulations cannot serve as a foundation for the defense of misrepresentation, because they directly conflict with sections 6937 and 6940, R. S. 1909. Dodt v. Insurance Co., 186 Mo. App. 168; Ins. Co. v. Stiewing, 173 Mo. App. 108; Harms v. Casualty Co., 172 Mo. App. 241; Welsh v. Insurance Co.,

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165 Mo. App. 233; Burns v. Insurance Co., 141 Mo. App. 212; Burridge v. Insurance Co., 211 Mo. 158; Karnes v. Insurance Co., 144 Mo. 413; Williams v. Insurnce Co., 73 Mo. App. 612; Keller v. Insurance Co., 58 Mo. App. 557; Price v. Insurance Co., 48 Mo. App. 281. (b) When the application is attached to the policy or indorsed thereon, or when the policy conforms to secs. 6937 and 6940, R. S. 1909, then, under proper pleadings and sufficient proof, the insurer is entitled to have the question of material misrepresentations submitted to the jury, but not otherwise. Bruck v. Insurance Co., 185 S. W. 753; Schuler v. Insurance Co., 191 Mo. App. 52; Clarkson v. Insurance Co., 190 Mo. App. 624; Buchholz v. Insurance Co., 177 Mo. App. 683; Roedel v. Insurance Co., 176 Mo. App. 584; Coscarella v. Insurance Co., 175 Mo. App. 130; Conner v. Association, 171 Mo. App. 364; Lynch v. Insurance Co., 150 Mo. App. 461; Salts v. Insurance Co., 140 Mo. App. 142; Williams v. Insurance Co., 189 Mo. 70; Keller v. Insurance Co., 198 Mo. 440; Jenkins v. Insurance Co., 171 Mo. 375; Kern v. Legion of Honor, 167 Mo. 471; Schuermann v. Insurance Co., 165 Mo. 641; Ashford v. Insurance Co., 98 Mo. App. 505. (c) The insurer is not entitled to a directed verdict or an outright reversal, for proof of issuance of the policy and death of the insured establishes a prima-facie case entitling the plaintiff to have the jury determine the credibility of the testimony, even though the plaintiff introduces nothing contradicting that offered by defendant. Keily v. K. of F. M., 179 Mo. App. 608; Winn v. M. W. of A., 157 Mo. App. 1; Buchholz v. Insurance Co., 177 Mo. App. 690; Warren v. Insurance Co., 182 S. W. 96. (2) While Dr. Vincent J. Mueller was allowed to testify freely and fully concerning the illness of Sadie Griffin, his patient, yet his evidence, as well as the records of the Bureau of Vital Statistics and those of the National Life and Accident Insurance Company, were highly incompetent. Smart v. Kansas City, 208 Mo. 162. (3) The facts and circumstances warranted the allowance of an attorney's

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fee, and the amount is reasonable under the decided cases now almost too numerous for citation. Kellogg v. Insurance Co., 133 Mo. App. 391; Cox v. Insurance Co., 154 Mo. App. 464; Buchholz v. Insurance Co., 177 Mo. App. 683; Coscarella v. Insurance Co., 175 Mo. App. 130; Stix v. Indemnity Co., 175 Mo. App. 171; Martin v. Insurance Co., 190 Mo. App. 703; Williams v. Insurance Co., 189 Mo. 70; Barber v. Insurance Co., 187 S. W. 867. (4) The defendant's instructions as requested enlarged on the misrepresentation statute and, without the court's modification, were erroneous. Sec. 6937, R. S. 1909. Furthermore, the defendant was not entitled to have the defense of misrepresentations submitted to the jury, and hence the court could not have committed error in modifying or refusing its instruction. Authorities under point I; Summers v. Insurance Co., 90 Mo. App. 691; Christian v. Insurance Co., 143 Mo. 460. (5) There is no merit in the assignment of error founded on alleged remarks of counsel for plaintiff, for reasons, among which, are: (a) The question is one for the sound discretion of the trial court. Huckshold v. Railroad, 90 Mo. 559; Obuchon v. Boyd, 92 Mo. App. 421; Brinkman v. Gottenstroeter, 153 Mo. App. 355. (b) When no exceptions are taken at the time they are deemed waived. Gidionsen v. Railroad, 129 Mo. 405; State v. Gartrell, 171 Mo. 512; Nichols & Shepard Co. v. Metzger, 43 Mo. App. 619; Meyers v. Casualty Co., 123 Mo. App. 682; Lynch v. Insurance Co., 150 Mo. App. 473. (c) Exceptions must include failure of the trial court to rebuke counsel. State v. Chenault, 212 Mo. 137; Eppstein v. Railroad, 197 Mo. 739. The court properly struck from the bill of exceptions the alleged exception to the failure of the court to reprove counsel because untrue. State ex rel. v. Wickham, 5 Mo. App. 301. Alterations made in a bill of exceptions by the trial judge before signature, though they be not in accord with the notes of the proceedings taken by the stenographic reporter, are conclusive upon the parties; if these alterations are

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not warranted by the facts (they are warranted here), the only remedy is that prescribed by the statute. Revised Statutes, secs. 2170, 2173 and 2174. The corresponding sections in the Revision of 1909 are secs. 2031, 2034 and 2035. (d) Exceptions made for the first time in a motion for a new trial, of course, come too late; and, moreover, "a motion for a new trial does not prove itself." Merriman v. Springfield, 142 Mo. App. 510. (e) It cannot be clearly determined from the garbled account whether or not the alleged remarks of counsel are proper or improper. Then, too, the address of opposing counsel should be given in full, since the alleged observations may be retaliatory only and hence proper. State v. Hayland, 144 Mo. 302; State v. Summers, 143 Mo. 220. (f) Where, as here, the judgment is for the right party, remarks of counsel are immaterial. Sackewitz v. Am. Biscuit Co., 78 Mo. App. 157; Mason v. Mining Co., 82 Mo. App. 371.

ALLEN, J.—This is an action originating before a justice of the peace, on a policy of insurance issued on November 11, 1912, insuring the life of one Sadie Griffin in favor of plaintiff, the mother of the insured, named as beneficiary therein. The insured died on September 24, 1913; and shortly thereafter plaintiff duly furnished defendant with proofs of death and demanded payment of the amount of the policy, but defendant refused to pay the same. Plaintiff prevailed before the justice of the peace and on defendant's appeal to the circuit court, and a trial there *de novo* before the court and a jury, there was a verdict and judgment for plaintiff in the sum of $279.70, being the amount of insurance provided for by the policy with interest thereon, together with ten per cent. damages and an attorney's fee of $100 as for vexatious refusal to pay. From this judgment defendant has brought the case here by appeal.

Plaintiff, to sustain the issues on her part, introduced the policy sued upon, showed that the premiums

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had been duly paid thereon, made proof of the death of the insured on September 24, 1913, and of the demand made upon defendant company and its refusal to pay. Testimony was also adduced in plaintiff's behalf respecting the value of the services of plaintiff's attorney in the action.

The defendant filed no answer, but sought to show that the insured procured the issuance of the policy by material misrepresentations respecting her health at and prior to the issuance thereof, and that no obligation was assumed by defendant under the policy, according to its terms, for the reason that the insured was not in sound health at the date of its issuance and delivery. Over plaintiff's objections, defendant introduced the proofs of death, consisting of a sworn statement of plaintiff together with a certificate of one Dr. Mueller, the physician who attended the insured in her last illness; both of these being on blanks furnished by the defendant company and consisting of answers made to questions propounded by defendant. And likewise over plaintiff's objections, the defendant introduced a certified copy of the certificate of death filed with the State Board of Health under the provisions of section 6684, Revised Statutes, 1909, and also the written application signed by the insured when she made application for the policy. Defendant then called Dr. Mueller as a witness in its behalf, and sought to elicit from him testimony respecting the condition of the insured's health at or prior to the issuance of the policy. It appears that his knowledge on the subject had been acquired in his professional capacity as the insured's physician, and, upon objection of plaintiff's counsel on this ground, his testimony was excluded.

Defendant tendered into court the amount of the premiums which had been paid to it upon the policy.

In rebuttal plaintiff adduced testimony tending to show that the insured appeared to be in good health at the time of the issuance of the policy. Plaintiff then called as a witness defendant's medical examiner

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who examined plaintiff at the time of her application for the insurance and reported thereon to defendant; and plaintiff put in evidence the written report of the examination signed by the witness.

I. Appellant assigns as error the action of the trial court in overruling its demurrer to the evidence. Appellant's contention in this regard proceeds upon the theory that the evidence conclusively establishes that on the date of the policy and at the time of the application therefor, the insured was afflicted with the disease which it is said resulted in her death, to-wit, a stricture of the rectum or tuberculosis of the rectum.

As to this it should be stated at the outset that the defense predicated upon alleged misrepresentations made by the insured in obtaining the policy of insurance, consisting of alleged false answers in the written application therefor, was not available to defendant under the circumstances of the case, and that the trial court should have excluded this application upon plaintiff's objection thereto. This is for the reason that the record discloses that neither the application nor the substance thereof was attached to or indorsed upon the policy as required by section 6978, Revised Statutes 1909. By failing to comply with the statute, the defendant lost the right to avail itself of the application as a means for invalidating the policy. This we have but recently held in Schuler v. Metropolitan Life Ins. Co., 191 Mo. App. 52, 176 S. W. 274, where, in an opinion by REYNOLDS, P. J., the question is fully considered and the authorities cited and discussed.

But the policy itself contained a provision to the effect that no obligation was assumed by defendant thereunder unless on the day thereof the insured were alive and in sound health; and it was competent for defendant to show in defense, as it sought to do, that the insured was not only not in sound health when the policy was issued, but was suffering from the very

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disease which resulted in her death. However, a condition of this character contained in a life insurance policy is affected and controlled by the provisions of our so-called "misrepresentation statute," viz, section 6937, Revised Statutes 1909. The rule of decision obtains to the effect that conditions of this character in the policy are unavailing to defeat the insurance, unless it appear that at the time of the issuance or delivery of the policy the assured was afflicted with a disease or diseases which caused or contributed to cause his death. [See Salts v. Insurance Co., 140 Mo. App. 142, 120 S. W. 714; Lynch v. Insurance Co., 150 Mo. App. 461, 131 S. W. 145; Dodt v. Insurance Co., 186 Mo. App. 168, 171 S. W. 655; Stephens v. Insurance Co., 190 Mo. App. l. c. 678, 679, 176 S. W. 253.] And whether or not the malady, if any, from which the insured was suffering at the time of the issuance or delivery of the policy, caused or contributed to cause the death, is, by force of the statute controlling the matter, a question for the jury—unless indeed it be that the question is foreclosed by the effect of an admission of the plaintiff in the case, standing wholly unexplained and unrepelled by anything whatsoever, as we held in the Stephens case, supra. The case before us, however, is wholly unlike the Stephens case.

It is true that in the certificate of Dr. Mueller, filed by plaintiff as a part of the proofs of death, the doctor states that the insured had been suffering from the very disease which caused her death for about eight or ten years. But the sworn statement of plaintiff, also filed as a part of the proofs of death, stated that the duration of the last illness was about two months. Furthermore, the report of defendant's medical examiner, showing the result of his examination of the insured at the time of the application for the policy, is to the effect that he found the insured, in his opinion, to be in good health, and that he recommended her as a first class risk. Also there is the testimony adduced by plaintiff that the insured

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appeared to be in good health when the policy was issued. Such evidence unquestionably made the case one for the jury under our law. In this connection see the recent case of Bruck v. Insurance Company, 194 Mo. App. 529, 185 S. W. 753, and cases there cited.

It follows that the demurrer to the evidence was properly overruled.

II. Appellant assigns as error the ruling of the trial court in sustaining plaintiff's objection to the testimony of Dr. Mueller when called as a witness for defendant. Section 6362, Revised Statutes 1909, provides, among other things, that a physician or surgeon shall be incompetent to testify "concerning any information which he may have acquired from any patient while attending him in a professional character, and which information was necessary to enable him to prescribe for such patient as a physician or do any act for him as a surgeon." Appellant contends, however, that the privilege vouchsafed by the statute had been waived. Such alleged waiver is predicated, for one thing, upon the fact that when Dr. Mueller was placed upon the stand, and after appellant's counsel had asked him a few preliminary questions, plaintiff's counsel, interposing a general objection, obtained permission of the court to question the witness, and proceeded to propound to him certain questions. But there is no merit in the contention that plaintiff thereby waived the privilege mentioned, for the reason that it clearly appears that plaintiff's counsel sought merely to lay a foundation for his objection later more fully made.

But it is earnestly contended that the privilege in question was waived by the filing of the certificate of this physician, as a part of the proofs of death, pursuant to a clause in the policy as follows: "Proofs of death under this policy shall be made upon blanks to be furnished by the company and shall contain answers to each question propounded to the claimant, physicians and other persons. . . . All the contents of such proofs of death shall be evidence of the facts

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herein stated in behalf of, but not against, the company."

There can be no doubt that where the insured, by a distinct provision in the policy, expressly waives the benefits of all laws disqualifying a physician from testifying concerning any information obtained by him in a professional capacity, and such waiver is expressed to include any person who may have any interest in or claim under the policy, the beneficiary is bound thereby. [See Keller v. Home Life Ins. Co., 95 Mo. App. 627, 69 S. W. 612; Modern Woodmen v. Angle, 127 Mo. App. 94, 104 S. W. 297; Adreveno v. Mutual Reserve Fund Life Ass'n., 34 Fed. 870.] But this policy contains no such provision. It merely provides for the filing of proofs of death, on blanks to be furnished by the company, and purports to make the recitals therein contained evidence in the company's behalf. And consequently the cases last mentioned, and other authorities of like purport which might be cited, do not here apply.

In support of its contention appellant relies upon Bolton v. Inter-Ocean Life & Casualty Co., 187 Mo. App. 167, 172 S. W. 1187; Western Travelers Accident Ass'n. v. Munsion, 73 Neb. 858, 1 L. R. A. (N. S.) 1068; 4 Wigmore on Evidence, sec. 2390.

The Bolton case, supra, decided by the Kansas City Court of Appeals, was a suit upon a policy of health insurance. The trial court admitted the testimony of the plaintiff's family physician, offered by defendant to show a particular fact, and this was assigned as error. The court said: "Inasmuch as plaintiff had sent defendant this doctor's report on that sickness we think plaintiff had waived the right to object to this witness testifying." It was held, however, that inasmuch as the fact sought to be proved by the witness was one which plaintiff had admitted, the exclusion of the testimony in question was harmless error. What were the circumstances under which the physician's report was filed does not appear. What was said in the opinion as to waiver of the privilege

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was unnecessary to a determination of the controversy before the court, for the reason stated in the opinion itself. It cannot be said that the matter was one in decision in the case, for it was expressly stated to be immaterial to a decision therein. We do not regard the language thus employed as being an adjudication of the question under consideration.

In Western Travelers Accident Association v. Munsion, supra, proofs of death were filed, consisting of an affidavit of the plaintiff, the beneficiary, and a certificate of the attending physician, in accordance with the provisions of the membership certificate sued upon. Upon the trial the attending physician was called as a witness by the plaintiff, and, over the objection of the defendant insurance company, he was permitted to testify. Upon appeal this was held not to be error. This case is by no means persuasive in support of appellant's contention. It does not appear that the defendant was in any position to invoke the statute relied upon. [See Thompson v. Ish, 99 Mo. 160, 12 S. W. 510; Groll v. Tower, 85 Mo. l. c. 254, 255.] And in the cases cited in the opinion, wherein the suits were upon contracts of insurance, the policies contained express waivers, as in Keller v. Insurance Co., supra, and Modern Woodmen v. Angle, supra.

In 4 Wigmore on Evidence, section 2090, to which appellant refers, it is said: "The sending of a physician's certificate, as part of the '*proofs of death,*' by the beneficiary of a contract of life insurance or the representative of the insured, is a voluntary disclosure of the physician's knowledge though made in pursuance of contract, and is therefore a waiver." If this is to be taken to mean that the filing of a physician's certificate by a beneficiary, as a part of the proofs of death, pursuant to a provision of the policy, operates as a waiver of the incompetency of the physician as a witness, as appellant appears to contend, the cases cited in support of the text, viz., Nelson v. Nederland Insurance Co., 110 Iowa 600, and Buffalo L. T. & S. D. Co. v. Knights Templar, etc., Ass'n.,

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126 N. Y. 450, wholly fail to support it. But we take it that the waiver mentioned is meant to apply only to the contents of the certificate itself. Such a certificate, constituting a part of the proofs of death, is admissible on the ground that the answers therein contained constitute admissions on the part of the beneficiary, subject, however, to contradiction or explanation. [See Stephens v. Insurance Co., supra, l. c. 680, and cases cited.] And the beneficiary cannot invoke the privilege here under consideration and thereby render the certificate inadmissible for the purpose mentioned. But it does not follow that the filing of such certificate, in compliance with the terms of the policy, constitutes a waiver of the statutory incompetency of the physician when called as a witness by the insurance company. [See Buffalo L. T. & S. D. Co. v. Knights Templar Ass'n., supra; Nelson v. Nederland Insurance Co., supra; Briesenmeister v. Sup. Lodge K. of C., 81 Mich. 525; Redmond v. Industrial Benefit Ass'n., 28 N. Y. Supp. 1075, affirmed in 150 N. Y. 167; 40 Cyc, 2400.]

"The statements in the proofs of death furnished by the beneficiary in a policy of life insurance on the patient's life are a waiver of the privilege only in so far as such statements refer to the matter claimed to be privileged." [40 Cyc, p. 2400.]

Such certificates are not admitted upon the theory that the statements of the physician therein contained may be received as evidence coming from him to establish the truth of the matters therein stated, but upon the theory that the statements in the certificate, filed as a part of the proofs of death, are to be taken as admissions made by the beneficiary and to be reckoned with as such in the case. Such admissions are not incompetent though made through the medium of the certificate of an attending physician; but the filing of such a certificate in order to comply with the provisions of the policy respecting proofs of death, does not operate as a waiver of the incompetency of the physician as a witness. [See Buffalo L. T. &

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S. D. Co., supra; Nelson v. Nederland Insurance Company, supra.]

No valid reason appears for holding that, by filing this certificate, required by the policy to be filed, the plaintiff, for whose benefit the contract of insurance was made by the insured, waived the right to invoke the statute which renders the attending physician incompetent to testify concerning any information acquired while attending the insured in a professional capacity. The case is not one where the statutory veil of secrecy thrown about the sick-room is voluntarily lifted by one otherwise entitled to invoke the privilege, as in Epstein v. Railroad, 250 Mo. 1, 156 S. W. 699; State v. Long, 257 Mo. 199, 165 S. W. 748; Michaels v. Harvey, —— Mo. App. ——, 179 S. W. 735; McPherson v. Harvey, —— Mo. App. ——, 183 S. W. 653; Priebe v. Crandall, —— Mo. App. ——, 187 S. W. 605. And to hold that a waiver of the incompetency of the physician arises from the mere fact of the filing of this certificate in order to comply with the terms of the policy would be to run counter to the established rule of decision generally prevailing on the subject.

We therefore rule this assignment of error against the appellant; and, for the reasons indicated above, we do not regard this ruling as "contrary to the decision" of the Kansas City Court of Appeals in Bolton v. Inter-Ocean Life & Casualty Company, supra.

III. Appellant complains of the action of the trial court in authorizing the jury to allow plaintiff ten per cent. damages and an attorney's fee, as for vexatious refusal, on the part of defendant, to pay the amount of the insurance, under the provisions of section 7068, Revised Statutes 1909.

Our courts have gone very far in leaving the matter of the awarding of damages and attorneys fees under the statute as for vexatious refusal to pay, to the discretion of the jury, to be determined upon a survey of all of the facts and circumstances in the

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case touching the conduct of the insurance company in the premises. [See Brown v. Railway Passenger Assurance Co., 45 Mo. l. c. 227; Keller v. Home Life Ins. Co., 198 Mo. l. c. 460, 95 S. W. 903; Barber v. Hartford Life Ins. Co., —— Mo. ——, 187 S. W. l. c. 873; Coscarella v. Insurance Co., 175 Mo. App. 130, 157 S. W. 873; Stix v. Indemnity Co., 175 Mo. App. 171, 157 S. W. 870; Jaggi v. Insurance Co., 191 Mo. App. l. c. 391, 392, 177 S. W. 1064.] But assuming that the question is one for the jury only when the facts and circumstances of the case, when viewed in their entirety, afford some substantial evidence to support an inference that the refusal to pay was unjustifiable and vexatious (see Weston v. Insurance Co., 191 Mo. App. 282, 177 S. W. 792; Patterson v. Insurance Co., 174 Mo. App. l. c. 44, 160 S. W. 59; Jaggi v. Insurance Co., supra.), we are of the opinion that in the instant case the trial court committed no error in submitting the question to the jury. We cannot say, as a matter of law, that the evidence wholly fails to support an inference that the delay was unwarranted and vexatious within the meaning of the statute.

IV. The trial court modified two instructions offered by defendant, by striking out certain words therefrom and gave the instructions as modified. This is assigned as error. It is unnecessary to set out the instructions, or to discuss the matter at length. It appears quite clear that the action of the court complained of could have constituted reversible error, if at all, only upon the theory that the question of misrepresentations on the part of the insured, in procuring the policy, was an issue in the case. And for the reason stated above, this defense was one not available to defendant.

V. Appellant also assigns as error the action of the trial court in permitting plaintiff's counsel, unrebuked, to make certain "inflammatory and unwarrantable" remarks in argument to the jury. But the

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record before us, and by which alone we can be guided, shows no exception taken to the action of the court in overruling defendant's objections to the remarks of plaintiff's counsel, save in one instance alone where the remark objected to cannot be said to have been prejudicial. The abstract of the bill of exceptions before us shows that in preparing the bill defendant's counsel inserted, in proper places therefor, statements to the effect that exceptions were duly saved to the various rulings of the court complained of in this connection, but that the trial judge, before signing the bill, struck out all of the same, save in the one instance mentioned. It is said that exceptions were in fact duly saved to all these rulings, at the trial, and that the said action of the trial judge in thus settling the bill of exceptions was wholly unwarranted. But this is a matter not before us for review. Appellant has brought here this bill of exceptions, signed by the trial judge. As it stands it imports verity, and can alone be looked to by us concerning matters of exception. [See Murphy v. Cooperage Co., 168 Mo. App. 11, 151 S. W. 191.] And as it fails to show any exception saved to the action of the court in overruling defendant's objections to any remarks of plaintiff's counsel that could be denominated prejudicial, we must rule this assignment of error against appellant.

Since we have found no reversible error in the record, the judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Thompson, J.*, concur.

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C. H. ALBERS COMMISSION COMPANY, Appellant, v. LOUIS E. VOGELSANG, Executor, Respondent.

St. Louis Court of Appeals, December 30, 1916.

1. **EXECUTORS AND ADMINISTRATORS: Presentation of Claims: Special Statute of Limitations: Manner of Raising.** It is unnecessary, in a proceeding in the probate court to enforce a claim against an estate, to plead the statute limiting the time within which such claims must be presented (Sec. 191, R. S. 1909, as amended by Laws 1911, p. 81), but it is sufficient if the point be raised in such a way as to make it clear to the court and counsel that the personal representative is relying upon the statute.

2. ———: ———: ———: ———. In a proceeding to enforce a claim against an estate, instituted in the probate court and taken to the circuit court by appeal, *held* that it sufficietly appeared, from statements of counsel for the executor and from an endorsement made by the trial judge upon the peremptory instruction given by him, that the court and adverse counsel understood that the executor was relying upon the point that the claim was barred by reason of claimant's failure to present it within the time limited by Sec. 191, R. S. 1909, as amended by Laws 1911, p. 81, so as to make such point available as a defense.

3. **TRIAL PRACTICE: Evidence: Effect of Attempted Withdrawal of Admissions.** Where plaintiff makes an admission of facts relied upon as constituting the defense, which it is not necessary for him to show to make out a *prima-facie* case, a subsequent announcement by him that he withdraws the admission will not have the effect of effacing the record that had then been made.

4. **APPELLATE PRACTICE: Inconsistent Position: Estoppel.** A claimant against an estate will not be heard to object, on appeal, that the newspaper publishing the notice of the granting of letters testamentary, as required by Sec. 82, R. S. 1909, as amended by Laws 1911, p. 79, was not a proper newspaper, where he himself put in evidence the affidavit of publication, as showing due publication of the notice, and the point is first raised in the appellate court.

5. **EXECUTORS AND ADMINISTRATORS: Presentation of Claims: Statute of Limitations: Construction.** Sec. 191, R. S. 1909, as amended by Laws 1911, p. 81, barring claims against estates that are not presented within one year *from the date of letters*, where notice is published within ten days after the granting of letters, is not affected by Sec. 82, R. S. 1909, as amended by Laws 1911, p. 79, which gives the form of notice for publication, and states that

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if such claims are not exhibited within one year *from the date of the last insertion of such publication*, they shall be barred.

6. ———: ———: ———: **Waiver.** The fact that an executor or administrator publishes a notice of the granting of letters, stating that claims will be barred unless presented within one year *from the date of last insertion of such publication*, pursuant to the form prescribed by Sec. 82, R. S. 1909, as amended by Laws 1911, p. 79, does not preclude him from asserting that claims are barred unless presented within one year *from the granting of the letters*, pursuant to Sec. 191, as amended by Laws 1911, p. 81, where such notice is published within ten days after the granting of letters.

Appeal from St. Louis City Circuit Court.—*Hon William M. Kinsey,* Judge.

AFFIRMED.

S. Mayner Wallace, Wm. R. Orthwein and *Shepard Barclay* for appellant.

(1) There was ample proof offered by plaintiff of the execution of the notes by their maker, which, with their recitals and the possession of the papers by plaintiff, constituted evidence of liability of the estate, which the learned trial judge erred in taking away from the jury by the instruction given. R. S. 1909, secs. 9,995, 10,021, 10,174; Boeka v. Nuella, 28 Mo. 180; Willard v. Moies, 30 Mo. 142. The attempt at defense (under the short special statute of limitation) was not complete so as to warrant the instruction as a matter of law, because defendant's evidence was deficient, and the issue defendant raised thereby was one of fact and not of law. Sess. Laws 1911, pp. 79-81, secs. 83, 191; Gannon v. Gas Co., 145 Mo. 502, (2) The circuit court erred in directing a verdict for defendant, because under the legislation of 1911, the bar of probate limitation runs from the "date of the last insertion" of the publication (Sept. 28, 1912), as recited in defendant's own published notice, following the last amendment of the statute on that point, and the exhibition to defendant and filing of the demand were prior to one year from that date. Sess. Laws Mo. 1911, p. 79, sec. 82. (3)

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The circuit court erred in directing a verdict for defendant, because the Act of 1911 (amending sec. 191) if applicable, was not invoked by defendant in his printed notice published in the Times. The publication did not claim a bar from the date of defendant's letters testamentary. Sess. Laws, Mo. 1911, p. 81, sec. 191. (4) The circuit court erred in instructing for a verdict for defendant, because the burden of proof was on defendant to establish the facts creating a statutory bar, and defendant did not discharge that burden. Hawkins v. Ridenhour, 13 Mo. 130; Wilson v. Gregory, 61 Mo. 421; Munday v. Leeper, 120 Mo. 418. (5) The circuit court erred in its instruction, because the burden of proof of the defense being on defendant, its proof should have been submitted to the jury, even if there was no contradictory testimony. Its credibility was for the jury. Gannon v. Gas Light Co., 145 Mo. 502; Castens v. Knights, 190 Mo. App. 65. (6) The circuit court erred in giving the peremptory instruction, because there was no proof offered by defendant to show that the publication of notice offered in evidence was in a newspaper designated for such publications by the Board of Judges in the Eighth Circuit, which proof is necessary to make such publication "valid and sufficient" under the statute law of that subject. R. S. 1909, secs. 500, 591, 593; Cissell v. Pulaski Co., 10 Fed. 892, 3 McCrary 447; Gibney v. Crawford, 51 Ark. 34, 9 S. W. 309. A strict compliance with laws creating a bar of limitation is required. Hawkins v. Ridenour, 13 Mo. 130. (7) The circuit court erred in giving the binding instruction, because the notice as published does not conform to the terms of amended section 191 (Sess. Laws 1911, p. 81), on which defendane relies for a bar, if that section were applicable. Any other notice than that prescribed as a bar amounts to no notice and constitutes no defense. Wilson v. Gregory, 61 Mo. 421; Munday v. Leeper, 120 Mo. 418. Here neither the affidavit nor other proof shows that the Times was a "newspaper," as required by sec-

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tion 82. (8) The circuit court erred in giving the instruction to the jury, because the interpretation of the amendments in 1911 to sections 82 and 191 require the former (Sec. 82) to be given paramount force, as the more equitable and just rule; and because being more particular (in fixing the date of the last publication) it is of paramount force over the more general terms in the other enactment. State v. Roach, 25n Mo. 552; City v. Lane, 110 Mo. 259; Musick v. Railroad, 114 Mo. 314. Ambiguity in Statutes of Limitation is resolved in favor of the longer period admissible under the terms of the sections involved. Crum v. Johnson, 92 N. W. 1054; Maxwell, Interp. Stats. (4 Ed.), p. 429. (9) The circuit court erred in the charge to find for defendant because defendant, by the instruction he asked, did not assign or rely upon the short Statute of Limitations, and hence the court should not have amended the instruction but accepted the same as a waiver of that bar, if it had been applicable. Wilson v. Gregory, 61 Mo. 421; Stiles v. Smith, 55 Mo. 363. The bar of this special, short, probate statute of limitations cannot properly "be first urged by objections to the admissions of evidence, nor by a demurrer to plaintiff's evidence." 25 Cyc. 1405, and cases cited to notes 32, 33. The objection by defendant's learned counsel during the trial was insufficient to apply the statute in question. It did not specify what term or time of bar was invoked. It stated no facts, and the instruction later offered by defendant makes no allusion to any bar of limitation, despite the court's broad hint on that point. The objection was not sufficient. Murphy v. DeFrance, 105 Mo. 62; Vail v. Jacob, 7 Mo. App. 571; Hunter v. Hunter, 50 Mo. 452; Harper v. Eubank, 32 Mo. App. 258. (10) The circuit court erred in its instruction for a verdict for defendant, because all the prerequisites to impose the bar of limitation claimed by defendant under sec. 191 (Sess. Laws, 1911, p. 79) were not proven by defendant.

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Neither the affidavit nor other proof showed that the St. Louis Times was designated to publish such notices, nor was that proof otherwise given by defendant. Sess. Laws, Mo. 1911, p. 79, sec. 83; R. S. 1909, secs. 591-593; State v. Tolle, 71 Mo. 645; Benton Co. v. Morgan, 163 Mo. 675; Hancock v. Whybark, 66 Mo. 672. (11) The intent of the existing law as shown by all the sections (as amended in 1911, secs. 82, 83, 191 and 195) is to define the beginning of the short limitation at the "last insertion" of the publication, being the time when full notice has been given of the letters; thereby fixing the "date of the letters," as part of the probate records. Sess. Laws 1911, pp. 79, 81, 82; secs. 82, 191, 195; Spaulding v. Suss, 4 Mo. App. 541 (construing similar sections of the former law, R. S., 1865, p. 490, sec. 19, and p. 502, sec. 6.)

Henry H. Oberschelp for respondent.

(1) The only provisions for notice of letters are all contained in section 82, R. S. 1909, as amended 1911, page 79, with which the claimant admits the executor complied. (2) The words in said notice, required by said amended section, "if such claims be not exhibited within one year from the date of the last insertion of such publication, they shall be forever barred," do not preclude the idea that under some circumstances claims may be barred in less time. (3) But no matter what interpretation might be placed on the words in said notice, it was in strict compliance with the law's requirements. (4) As there was publication of such notice within ten days after the letters were granted, in accordance with section 191, R. S. 1909, as amended 1911, pages 81-82, the demand is forever barred, not having been exhibited within one year from the date of letters. Wilkinson v. Thom, 185 S. W. 552; Savings Bank v. Burgin, 73 Mo. App. 108, 112, lines 17-20; Massie v. Fuqua, No. 41574 Circuit Court City of St. Louis. (5) The only provisions with reference to the barring of claims against estates of deceased persons

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are contained in section 191, as amended 1911, pages 81-82, the language of which is too plain to admit of doubt as to its meaning. It alone is controlling in determining the bar to claims. (6) The case was tried on the theory that the executor's notice was published in the proper newspaper. Such question cannot for the first time be raised in appellate court. (7) Furthermore, in the absence of proof to the contrary, it must be conclusively presumed the publication was legal. Foot-note to sec. 591, R. S. 1909; Kansas City v. Mastin, 169 Mo. 80. (8) Furthermore, the circuit court was authorized and compelled to take judicial notice of its own orders and records especially of such a general nature and the St. Louis Times was the duly authorized newspaper, and claimant does not deny it. (9) An executor's notice of letters granted by the probate court need not necessarily be published in the newspaper officially designated by the circuit court. Secs. 82 and 591, R. S. 1909. (10) As the necessary facts were admitted, there was no question for the jury. (11) As this claim arose in the probate court, no pleading by the executor was necessary. The bar of limitation was called to the attention of the trial judge, who decided in favor of the executor accordingly. Furthermore, claimant, by its conduct and action at the trial, recognized that such defense was being made. Wencker v. Thompson, 96 Mo. App. 59, 66. (12) The witnesses for claimant corporation, being connected with it, were disqualified to testify with reference to said notes by reason of the death of the party they claimed executed same. (13) Alterations in each of the notes were such as to absolutely void said notes and preclude any recovery thereon. McCormack Harvester Co. v. Blair, 146 Mo. App. 374.

ALLEN, J.—This is an action to enforce against the estate of Henry B. Vogelsang, deceased, a claim founded upon two promissory notes; one note being for $2158.65, with interest, upon which it is alleged that nothing has been paid, and the other being for

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$1300 on which a credit of $1000 appears, leaving a balance of $300, and interest, claimed to be due thereon.

The probate court allowed the claim against the estate, and the defendant executor appealed to the circuit court, where, upon a trial *de novo,* the court, at the close of plaintiff's case, peremptorily directed a verdict for defendant upon the ground that plaintiff's claim had not been presented to the executor within the time allowed by law but was barred by the special Statute of Limitations, to-wit, section 191, Revised Statutes 1909, as amended in 1911. [See Laws 1911, p. 81.] The jury returned a verdict for defendant in accordance with the peremptory instruction; and from a judgment entered accordingly, plaintiff prosecutes the appeal before us.

The record discloses that Henry B. Vogelsang died on May 20, 1912; that on August 29, 1912, letters testamentary upon his estate were granted to the defendant executor, and that, within ten days thereafter, to-wit, on September 7, 1912, the executor began publication of the notice to creditors hereinafter referred to, which notice was published once a week for four consecutive weeks, the last publication being on September 28, 1912. Notice of plaintiff's demand was served on the defendant executor on September 25, 1913. At the trial in the circuit court plaintiff's counsel stated that these facts were admitted by the parties; and that it was further admitted that a certain "publication affidavit of one G. S. Pollard of the St. Louis Times is a correct statement of the publication to creditors on the part of said executor and is marked as defendant's Exhibit A." This affidavit, in which appears a copy of the notice to creditors, was thereupon admitted in evidence. The notice thus shown to have been published by the defendant as such executor is as follows:

"Notice is hereby given that letters testamentary on the estate of Henry B. Vogelsang, deceased, were

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granted to the undersigned by the probate court of the city of St. Louis, on the 29th day of August, 1912.

"All persons having claims against said estate are required to exhibit the same to the undersigned for allowance, within six months after the date of said letters, or they may be precluded from any benefit of said estate, and if such claims be not exhibited within one year from the date of the last insertion of this publication, they shall be forever barred."

When these facts had thus come into the case by way of admissions, defendant's counsel objected to the introduction of any further evidence on the ground that the facts so disclosed showed "that neither of the claims were presented within the required time and that they are barred by the statute." A colloquy between court and counsel then ensued; and plaintiff's counsel attempted to withdraw his "admission" because of the alleged failure of defendant's counsel to abide by an oral agreement said to have been entered into by counsel. The court ultimately overruled defendant's objection; and plaintiff adduced proof going to show that the notes were valid obligations of the deceased, and that the respective amounts claimed were due and payable thereon.

At the close of plaintiff's case the court, at defendant's request, gave the peremptory instruction above mentioned, indorsing thereon the following notation, viz: "Given upon the ground that plaintiff's claim is barred by the special Statute of Limitations, section 191, Revised Statutes 1909, as amended March 13, 1911."

From what we have said above it will be seen that the trial court proceeded upon the theory that, since the defendant executor, in compliance with the law, began the publication of the notice to creditors within ten days after the issuance of the letters, the one year period of limitation provided by the statute, as amended in 1911, began to run from the date of the issuance of such letters, to-wit, August 29, 1912; and as plaintiff

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did not serve the defendant with notice of its claim until September 25, 1913, the demand was barred by the statute.. Plaintiff, appellant here, contends, on the other hand, that under the statute, as amended, when correctly interpreted and applied to the facts of this case, the one year period of limitation did not begin to run until the date of the last insertion of the publication of the notice aforesaid, to wit, September 28, 1912; and that consequently plaintiff's claim was not barred, when notice thereof was served on the executor on September 25, 1913.

Before considering the question thus presented, we shall dispose of certain points raised by appellant's learned counsel.

It is said, for one thing, that the bar of the statute was not properly invoked at the trial. But we are not persuaded that there is any merit in this suggestion. That it is unnecessary to plead the statute, in a case originating in the probate court, is not disputed. And it appears that the point was raised in a way such as to make it clear to court and counsel that defendant was relying upon the special statute. [See Wencker, Admr., v. Thompson's Admr., 96 Mo. App. l. c. 66, 69 S. W. 743.] Indeed it appears from statements of defendant's counsel in the trial of the case below that defendant proceeded upon the theory that this was the only defense to be asserted. And the court, in giving the peremptory instruction, noted thereon that it was given upon the ground that the claim was barred by section 191, Revised Statutes 1909, as amended in 1911.

It is urged that the evidence adduced sufficed merely to make the question respecting the bar of the statute an issue to be determined by the jury. But we cannot assent to this. The facts that came into plaintiff's case, in the manner above shown, left no issue of fact to be determined respecting the matter. It only remained for the court to interpret the provisions of the special Statute of Limitations and

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apply the same to the undisputed facts. It is true that some of the facts thus developed need not have been shown by plaintiff to make out a prima-facie case; but they were shown—plaintiff's counsel proceeding, it seems, upon the theory that plaintiff's claim would be contested only on the ground that notice thereof had not been given the executor in due time and that counsel had agreed as to the facts. The subsequent statements of plaintiff's counsel—viz: "I will withdraw our admission;" "We aren't admitting anything now"—did not have the effect of effacing the record that had then been made. Nor was plaintiff's case prejudiced by the course which its counsel pursued; for if defendant's position be correct, it is clear that plaintiff could not have escaped the bar of the statute invoked.

In this connection, it is argued, that no proof was adduced tending to show that the St. Louis Times is a newspaper published in the city of St. Louis; and it is said that neither the trial court nor this court can take judicial notice of that fact. But plaintiff itself produced and put in evidence the affidavit of publication, as showing the due publication of the notice to creditors; and the point now sought to be raised was in no manner suggested below. It is unnecessary, therefore, to here give the matter any further consideration.

We come then to the controlling question in the case, viz., whether the one-year period of limitation began to run from the date of the issuance of the letters to the defendant executor, or from the date of the last insertion of his publication of notice to creditors. In considering this question we must have regard to the precise language of the sections of the statute involved. Section 191, Revised Statutes 1909, as amended March 13, 1911 (Laws 1911, p. 81), is as follows:

"Section 191. All demands not thus exhibited in one year shall be forever barred, saving to infants,

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persons of unsound mind or imprisoned, and married women one year after the removal of their disability, *and said one year shall begin to run from the date of the letters where notice shall be published within ten days after letters are granted, and in all other cases said one year shall begin to run from the date of the last insertion of the publication of the notice.*" (Italics ours.)

The notice to creditors, published, as above stated, was drawn in precise conformity to section 82, Revised Statutes 1909, as amended March 13, 1911 (Laws 1911, p. 79), which is as follows:

"Section 82. Within ten days after letters are granted the executor or administrator shall publish in some newspaper published in the county where letters of administration have been granted, and if no paper is published in such county, then in a paper published in any other county in the State nearest to the county where such letters of administration have been granted for three weeks, a notice that letters testamentary or of administration have been granted to him, stating the date, and requiring all persons having claims against the estate to exhibit them for allowance to the executor or administrator within six months after the date of letters, or they may be precluded from any benefit of such estate; and that if such claims be not exhibited within one year from the date of the last insertion of such publication, they shall be forever barred."

From a reading of section 191, supra, as amended, it quite clearly appears that the lawmakers therein stated with certainty and precision the date from which the one year period of limitation shall begin to run in each of the two instances mentioned; that is to say, that if the notice to creditors be published within ten days after the granting of letters, then the one year shall begin to run from the date of such letters; but that if such notice be not published within ten days from the granting of the letters, then the one year

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period shall begin to run from the date of the last insertion of the publication of the notice. In the case before us the notice was published within ten days from the date of the issuance of the letters. Therefore, under section 191, as amended, the one-year statute began to run from the date of the granting of the letters to the defendant executor; unless it be that section 82, as amended, which prescribes the form of the notice to creditors, is to be taken as controlling the matter, and as having the effect of prescribing that the one year period shall in every instance begin to run from the date of the last insertion of the publication of notice to creditors, despite the provisions of section 191, as amended, to the contrary; or unless it be that an executor or administrator who publishes notice to creditors in conformity with section 82, as amended, stating that if claims "be not exhibited within one year from the date of the last insertion of this publication, they shall be forever barred," is bound by such notice, though the publication was begun within ten days from the issuance of the letters, and despite the specific provision of section 191, as amended, applicable where the publication is so begun.

We regard it as clear that section 191, as amended, which is the limitation statute, must control the matter in hand. Its provisions are explicit and clear; and there appears to be no room for the contention that it is to be regarded as altered or modified by section 82, as amended, which merely provides the form that the notice to creditors shall take. Nor, in view of the provisions of section 191, as amended, do we think that an executor or administrator who publishes notice to creditors in the form prescribed by section 82, as amended, though such publication is begun within ten days from the issuance of letters, is bound thereby, in the sense that, in behalf of the estate upon which he is administering, he is precluded from asserting that claims are barred unless exhibited within one year from the granting of the letters. Section 82, as amended, pur-

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ports to prescribe one general form for the notice to creditors, to be employed in all cases, regardless of the time when the publication may begin. It is unfortunate that, in enacting this section, regard was not had to the alternative provisions of section 191, supra, as amended; but it cannot be said that an executor or administrator is in any wise at fault if he follows literally the terms of the statute providing precisely what his notice shall contain; nor that the estate upon which he is administering must on that account lose the benefit of the provisions of section 191, as amended, when the publication is begun within ten days from the issuance of the letters. It is said by plaintiff's learned counsel that this view ascribes to the Legislature the intention of providing for a notice, in cases such as that before us, which is false and misleading (if not fraudulent) on its face. It is true, as said, that the lawmakers, in prescribing the form of notice, unfortunately failed to reckon with the fact that the limitation section (sectio 191, as amended) distinctly provides that the time when the period of limitation shall begin to run shall depend upon whether the publication of the notice is begun within ten days of the granting of the letters or otherwise. But it is pertinent to here inquire whether a claimant is entitled to rely solely upon the form of notice published by the executor. We think that he must be held to a knowledge of all of the statutory provisions to be reckoned with in the premises, that section 191, as amended, prescribes with certainty the time when the one year shall begin to run in each of the instances therein mentioned, and that the publication of the notice in the form prescribed by section 82, as amended, is apparently made necessary, in every case, by the terms of that section.

There is nothing to suggest that plaintiff did in fact rely upon the form of the notice published, and was thereby misled; but we do not mean to say that evidence tending to show this would in any wise alter the situation, or would be competent evidence in the case.

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An argument is advanced by appellant, predicated upon the wording of section 195, Revised Statues 1909, as amended in 1911 (Laws 1911, p. 82). This section need not be here quoted. A scrutiny of it discloses that the language employed, referring to section 191, supra, tends to support, rather than to militate against, the views expressed above.

In support of appellant's contention, that the period of limitation here began to run from the date of the last insertion of the publication, and not from the date of the granting of the letters, we are referred to the opinion of this court by BAKEWELL, J., in Spaulding v. Suss, 4 Mo. App. 541. But the language which appellant quotes therefrom (4 Mo. App. l. c. 543, 544)—having reference to section 19 of article 2, Wagner Stat., p. 86—was unnecessary to a decision in the case, and when the entire opinion is reckoned with we do not regard it as authority in support of the argument advanced by appellant.

In support of the insistence that we ought to construe the sections of the statute here under consideration so as to resolve any ambiguity in favor of the longer period of limitation, we are referred to the case of Hawkins v. Ridenhour, 13 Mo. 130. It was there said that since the notice to creditors, in that case, was not published until thirty-one days after the date of the letters of administration, it was not a compliance with the statute which required publication within thirty days, the court adding: "As the law authorizing it has a tendency to destroy rights, we shall require a strict compliance with its provisions." We perceive nothing in this to sustain appellant's position. And in view of the clear and explicit provisions of section 191, as amended in 1911, prescribing with certainty that, under circumstances such as are here present with respect to the publication of the notice, the one year period of limitation shall begin to run from the date of the issuance of the letters, there ap-

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pears to be no room for a construction of the statute in favor of a longer period of limitation.

Other authorities cited in the briefs need not be discussed. For the reasons indicated, we are of the opinion that the one-year period of limitation began to run against plaintiff's claim on the date of the granting of the letters testamentary to the defendant executor. [In this connection see Wilkinson v. Thom, 194 Mo. App. 173, 185 S. W. 552.] And as the claim was not lawfully exhibited to the executor within such period, we must hold that it was barred, and that, under the circumstances of the case, it was proper to give the peremptory instruction, on this ground, at the close of plaintiff's case.

It follows that the judgment below should be affirmed, and it is so ordered. *Reynolds, P. J.*, and *Thompson, J.*, concur.

ANNIE STEINBRUEGGE, Appellant, v. PRUDENTIAL INSURANCE COMPANY OF AMERICA, Respondent.

St. Louis Court of Appeals, December 30, 1916 and January 16, 1917.

1. **STATUTE OF LIMITATIONS: Pleading: Demurrer.** The Statute of Limitations can be invoked by a special demurrer, where the petition, on its face, discloses that the action is barred by the general statute, and nothing is pleaded as an exception relieving against the bar.
2. **———: ———: Avoidance of Bar.** If the cause of action is such that the bar of the general Statute of Limitations may be obviated by some exception thereto, plaintiff must plead the facts that bring the case within such exception.
3. **JUSTICES' COURTS: Pleading.** Under Sec. 7412, R. S. 1909, technical rules of pleading are wholly inapplicable to a statement of a cause of action before a justice of the peace.
4. **———: ———: Sufficiency of Statement.** The statement of the cause of action, in a suit filed in a justice's court, is sufficient if it serves to reasonably apprise the defendant of the nature of

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the claim asserted against him and is sufficiently specific and definite to bar another action on the same demand.

5. ———: ———: ———: **Statute of Limitations: Avoidance of Bar.** In a suit instituted in a justice's court, the statement need not, in order to state a cause of action, plead the facts showing an exception relieving against the bar of the general Statute of Limitations; and proof of such facts may be made at the trial, notwithstanding they are not pleaded as an exception in the statement.

6. ———: **Statute of Limitations: Manner of Invoking.** If the defendant, in an action instituted in a justice's court and appealed to the circuit court, wishes to raise the point that plaintiff's statement shows his cause of action is barred by the Statute of Limitations, he must do so, either by pleading the statute relied on or by invoking the same in some appropriate manner at the trial.

ON MOTION FOR REHEARING.

7. **JUSTICES' COURTS: Appeal to Circuit Court: Rules of Practice.** Where a case is appealed from a justice's court to the circuit court, the general rules of practice in the latter court govern, but not the rules of pleading applicable to causes originating therein.

8. ———: ———: **Amended Statement: Manner of Determining Sufficiency.** Where an action originates before a justice of the peace and is appealed to the circuit court, the sufficiency of an amended statement filed in the latter court is to be determined by the requirements of the law applicable to statements filed in justices' courts.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow,* Judge.

REVERSED AND REMANDED.

James J. O'Donohoe for appellant.

(1) The Statute of Limitations does not run against a married woman. Section 1894, R. S. 1909; Smith v. Ins. Co., 64 Mo. 330; Throckmorton v. Pence, 121 Mo. 50; Lindell Real Estate Co. v. Lindell, 142 Mo. 61; Linville v. Greer, 165 Mo. 380; Bucher v. Hahl, 199 Mo. 320; Elliott v. Machine Co., 236 Mo. 546; State v. Macy, 72 Mo. App. 427; Rosenberger v. Mallerson, 92 Mo. App. 368; Linck v. Vorbauer, 104 Mo. App. 368. It was permissible to prove that plaintiff was a married woman under the allegation of full performance. Martin v. Modern Woodmen, 158 Mo. App. 468; Nichols v. Ins. Co., 170 Mo. App. 437; Andrus v.

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Ins. Assn. Co., 168 Mo. 151. This is especially true in cases originating in the justice's court. Coscarella v. Ins. Co., 175 Mo. App. 130; Conn. Co. v. Orr, 150 Mo. App. 705. Any statement of a cause of action begun before a justice of the peace is sufficient if it apprises the opposite party of the nature of the action and is sufficient to bar another action. Dalton v. United Railways Co., 134 Mo. App. 392; Telephone Co. v. Hope, 139 Mo. App. 282. On a trial *de novo* in the circuit court the rule is the same. Shearman v. Rockwood, 26 Mo. App. 403; Ray v. Railroad, 25 Mo. App. 104. A demurrer is not known in justice court pleadings and is not the proper manner to test the sufficiency of a pleading in a case originating before a justice of the peace. Conn. Co. v. Orr, 150 Mo. App. 707, 708. The Statute of Limitations is an affirmative defense and is properly taken advantage of by answer in cases originating in the circuit court. Smith v. Dean, 19 Mo. 63; Johnston v. Ragan, 265 Mo. 447; Whiteside v. Magruder, 75 Mo. App. 364; Elsea v. Pryor, 87 Mo. App. 157. If the pleader in cases thus originating seeks by his demurrer to take advantage of the Statute of Limitations he must plead the very provision on which he depends. Knisely v. Leathe, 256 Mo. 359. Matters avoiding the bar of the Statute of Limitations should be pleaded in the reply and not in the petition. Shearlock v. Ins. Co., 182 S. W. 89. (2) The policies sued on were payable twenty-four hours after acceptance of satisfactory proofs of death. This acceptance was a condition precedent to liability and no action could be maintained until the condition was complied with or waived. Burnham v. Ins. Co., 75 Mo. App. 399; Leigh v. Ins. Co., 37 Mo. App. 59; Sims v. Ins. Co., 47 Mo. 59; Exchange Bank v. Ins. Co., 109 Mo. App. 658; Burgess v. Ins. Co., 114 Mo. App. 179; Queen of Ark. Ins. Co. v. Laster, 156 S. W. (Ark.) 848; Da Rin v. Casualty Co., 108 Pac. (Mont.) 649; American Central Ins. Co. v. Western Ins. Co., 148 Fed. 77; Metropolitan Life Ins. Co. v. Wagner, 109 S. W. (Tex. Civ. App.)

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1120; 25 Cyc. 95; 1 Corp. Jur. 976. (3) The policies sued on stipulate that no action shall be maintainable until after the filing and acceptance of proofs of death. Hence the Statute of Limitations could not begin to run until February 1904, when the proofs were filed and accepted. Leigh v. Ins. Co., 37 Mo. App. 542; Murphy v. North British & Mercantile Co., 61 Mo. App. 323; McNees v. Ins. Co., 61 Mo. App. 335; Kauz v. Imp. Order Red Men, 13 Mo. App. 341; Maddox v. Ins. Co., 56 Mo. App. 343; Clanton v. Travelers Protective Assn., 101 Mo. App. 322; Porter v. Ins. Co., 62 Mo. App. 520; Am. Nat'l. Bk. v. Gillimore, 166 S. W. (Tex. Cir. App.) 17; Railway Passenger, Etc., Ass'n. v. Loomis, 142 Ill. 560; Spratley v. Ins. Co., 11 Bush. 43; Minnehaha v. Boyce, 138 N. W. 287; Larue v. Kershaw, Etc., Co., 59 So. 155; Gray v. Givens, 26 Mo. 291; Stark Bros. Co. v. Gooding, 175 Mo. App. 354; Rabsuhl v. Lack, 35 Mo. 316; State ex rel. v. Peacock, 45 Mo. 263; Osborne v. Hopkins, 160 Cal. 501; Re Hamlin, 133 Wis. 140; Pitman v. Ball, 140 Mo. App. 395; Staninger v. Tabor, 103 Ill. App. 330; Ganser v. Ganser, 83 Minn. 199; Brown v. Silver, 2 Neb. 164; Cary v. Koener, 200 N. Y. 253; Behlmer v. Grand Lodge, 100 Minn. 305; Purcell v. Land Title Co., 94 Mo. App. 5; Stewart v. National Council, 147 N. W. (Minn.) 651; Bold v. Buchanan, 176 Mo. App. 60; 1 Corp. Jur. 945; 25 Cyc. 1065, 1066; 2 Bacon (3 Ed.), sec. 446; Cooley's Briefs, pp. 3963 and 3972. (4) The Statute of Limitations is a part of the policy as much so as if written therein, and like policy stipulations can be waived. Shearlock v. Ins. Co., 182 S. W. 89; McLeod v. Ins. Co., 190 Mo. App. 653; Chandler v. Ins. Co., 180 Mo. App. 394; Nicholas v. Ins. Co., 101 N. W. 118; 2 May on Ins. (4 Ed.), sec. 464; Lewis v. Ins. Co., 52 Me. 492; 4 Cooley Briefs Ins., pp. 3477, 3532 (cases cited). The Statute of Limitations is waived, though legally barred, by the insurer denying liability on other grounds. 2 Bacon Benefit Soc. (3 Ed.), sec. 445; 3 Cooley's Briefs on Ins., p. 2680; 4 Cooley's Briefs on Ins., pp. 3989, 3993 (cases

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cited); 2 May on Ins. (4 Ed.), sec. 488; Vance on Ins. p. 510. Such waiver may occur after the cause of action is barred and need not be based upon a new agreement nor combine the elements of an estoppel. Dezell v. Ins. Co., 176 Mo. 253; Hamilton v. Railroad, 80 Mo. App. 601; Crenshaw v. Ins. Co., 71 Mo. App. 48; Fink v. Ins. Co., 66 Mo. App. 513; Fink v. Ins. Co., 60 Mo. App. 678; Stiepel v. Ins. Co., 55 Mo. App. 224; Equitable Life Society v. Mining, 58 Fed. 541; Prentice v. Ins. Co., 77 N. Y. 489; Ins. Co. v. Dierks, 43 Neb. 475; Ins. Co. v. Clark, 59 S. W. (Ky.) 863; Ins. Co. v. Monroe, 101 Ky. 12; Ins. Co. v. Allis Co., 11 Colo. App. 264; Union Casualty & Surety Co. v. Mondy, 18 Colo. App. 395; Johnson v. Ins. Co., 1 N. D. 167; Ins. Co. v. Kukral, 7 Ohio Cir. Ct. R. 356. The defendant is estopped from setting up the defense founded upon the Statute of Limitations, for it was aware of that defense in 1911, when it led the plaintiff into the trouble and expense of instituting this action in the belief that defendant's sole defense was that the insured was not dead. Shearlock v. Ins. Co., 182 S. W. 89; McCollum v. Ins. Co., 61 Mo. App. 352; Bowen v. Ins. Co., 69 Mo. App. 277, 278; Dolan v. Ins. Co., 88 Mo. App. 666; Oehler v. Ins. Co., 159 Mo. App. 707, 708; Pace v. Ins. Co., 173 Mo App. 485; Keys v. K. & L. of Security, 174 Mo. App. 671; 2 Bacon Benefit Soc. (3 Ed.), sec. 435 (cases cited); 3 Cooley's Briefs on Ins., pp. 2733, 2739 (cases cited); 2 May on Ins. (4 Ed.), sec. 488, p. 1157; Antes v. Assurance Co., 84 Iowa, 355; Appleton v. British A. Ass'n. Co., 46 Wis. 33; Smith v. Ins. Co., 3 Dak. 80, Consineau v. Ins. Co., 15 Ont. R. 329; Bates v. German Commercial Acc. Co. (Vt. S. C.), 88 Atl. 532. The Statute of Limitations does not extinguish the debt, but simply withholds the remedy. Miller v. Miller, 169 Mo. App. 432. The remedy can no longer be withheld when the bar of the statute is lifted in the manner prescribed in sections 1909, 1911, R. S. 1909, or by estoppel, waiver or in any other manner recognized in law. Shearlock v. Ins. Co., 182 S. W. 89. (5) The im-

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proper acts of defendant prevented the commencement of the action until 1911. Hence the Statute of Limitations could not begin running until that time under section 1905, Revised Statutes 1909. Smith, Adm'r, Etc., v. Newby, 13 Mo. 159; Nelson v. Beveridge, 21 Mo. 22; Foley v. Jones, 52 Mo. 64; Wells v. Halpin, 59 Mo. 92.

Fordyce, Holliday & White for respondent.

(1) .The general objection to the introduction of evidence should be sustained when the plaintiff shows by his pleadings that his demand is barred by the Statute of Limitations, and if the plaintiff is relying upon any exception to take the case out of the statute, the exception should be pleaded. Burrus v. Cook, 215 Mo. 504; Canada v. Daniel, 175 Mo. App. 68. (2) The plaintiff's petition in this case shows on its face that her claim was barred by the Statute of Limitations, since it showed that the insured had died more than ten years before the suit was filed. Kauz v. Great Council, 13 Mo. App. 341, at page 344; Boyd v. Buchanan, 176 Mo. App. 56; 25 Cyc, 1198; Revised Statutes 1909, sec. 1888. (3) Plaintiff's amended petition nowhere stated that the planitiff was or had been a married woman during all the times mentioned in the petition, nor did counsel offer to make any such amendment at the trial. Therefore, that fact was not before the trial court for consideration and cannot be considered here. Burrus v. Cook, 215 Mo. 496; Section 2081 R. S. 1909. (4) The facts pleaded by the plaintiff in the amended petition were not sufficient to bring the case within any of the exceptions to the Statute of Limitations. R. S. 1909, section 1909; Wells v. Hargrave, 117 Mo. 563; Monroe v. Harrington, 110 Mo. App. 512; Petty v. Tucker, 166 Mo. App. 107.

ALLEN, J.—This is an action upon three "industrial policies" of insurance. The suit was instituted, on September 19, 1911, before a justice of the peace,

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where plaintiff prevailed. Defendant appealed to the circuit court, and when the cause came on for trial there, defendant's counsel objected "to the introduction of any evidence under the petition on the ground that it shows on its face that the claim is barred by the Statute of Limitations." The court sustained this objection. Plaintiff's counsel then sought to make an offer of proof, but the court declined to permit him to do so; and after a spirited colloquy between the court and plaintiff's counsel, plaintiff took an involuntary nonsuit, with leave to move to set the same aside. And after an unsuccessful motion to set aside the nonsuit, plaintiff duly perfected her appeal to this court.

The petition, or statement of plaintiff's alleged causes of action, is in three counts, each predicated upon one of the three policies sued upon. From the allegations thereof it appears that the three policies were issued by defendant in the city of St. Louis, one on April 8, 1895, another on July 8, 1895, and the third on April 5, 1897, insuring the life of one David Cahill, the brother of plaintiff; and that plaintiff sues upon the policies as being within the "facility of payment" clause contained in each thereof, alleging also that it was agreed by and between her and the defendant and the insured that the insurance would be payable to her.

In each count it is averred that David Cahill, the insured, died on or about the sixth day of June, 1899, leaving no wife or child surviving him and no estate on which to administer.

In each count it is further averred that, at the time of the death of the insured, he had duly performed all conditions in the policy by him to be performed; that within a few weeks after his death plaintiff notified defendant thereof, but that defendant failed and neglected to furnish blanks on which to make proofs of death until the year 1904; that on or about January 8, 1904, plaintiff duly furnished defendant with proofs

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of death and surrendered to defendant the policy of insurance sued upon in each count, and the receipt book showing the payment of premiums thereon, upon defendant's promise that each policy would be paid immediately; but that payment was not made, and that the policy and receipt book were not returned until October, 1911.

It is further alleged in each count that about the month of June, 1907, and again during the months of July and August, 1907, defendant disclaimed all liability under the policy sued upon, upon the sole ground that the insured was not dead, whereby, it is alleged, defendant waived the delay in filing proofs of death, and likewise waived all limitations as to the time within which suit might be brought on the policy; and that until June, 1907, defendant had led plaintiff to believe that it would pay the policy, and from time to time promised to do so.

The prayer of the first count is for judgment for $98, with interest, and for ten per cent thereof as damages and an attorney's fee of $25 as for vexatious refusal of defendant to pay the amount of the policy. Such is likewise the prayer of the second count. The prayer of the third count is for $168, with interest, with ten per cent thereof as damages and an attorney's fee of $25 as for vexatious refusal to pay.

Evidently the trial court sustained defendant's objection to the introduction of any evidence upon the theory that plaintiff's petition, or statement, shows upon its face that the demand was barred by the general Statute of Limitations applicable, and that if plaintiff was relying upon some exception or exceptions such as would operate to relieve against the bar of the statute, it was plaintiff's duty to plead such exception or exceptions. Plaintiff (appellant here) asserts that her proof, had it been received, would have shown an exception or exceptions such as would have operated to prevent the bar of the statute—for one thing that plaintiff is a married woman, though this

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was not pleaded. And appellant further contends that the petition or statement does plead facts sufficient, if true, to relieve against the bar of the statute.

It is quite true that the rule now established in this State is that the Statute of Limitations can be invoked by means of a special demurrer, where the petition, on its face, discloses that the action is barred, and nothing is pleaded as an exception relieving against the bar of the general statute; that if the cause of action is such that the bar of the general statute may be obviated by some exception thereto, plaintiff must plead the facts bringing the case within such exception. [See Burrus v. Cook, 215 Mo. 496, 114 S. W. 1065; Garth v. Mottor, 248 Mo. l. c. 482, 154 S. W. 733.] Whatever uncertainty as to this may have existed by reason of some of the earlier decisions of our Supreme Court is removed by the decision in Burrus v. Cook, supra. But in applying this doctrine the trial court must, we think, have overlooked the fact that the suit was one instituted before a justice of the peace, where the technical rules of pleading do not prevail. Our statute, namely, section 7412, Revised Statutes 1909, provides that "no formal pleadings on the part of either plaintiffs or defendants shall be required in a justice's court." etc. This statute has time and again been considered and applied by our courts, and it has uniformly been held that technical rules of pleading are wholly inapplicable to a statement of a cause of action before a justice of the peace. [See Connelly v. Parrish, 189 Mo. App. 1, 176 S. W. 546; Dalton v. United Rys. Co., 134 Mo. App. 392, 114 S. W. 561.] Numerous authorities might be cited in this connection, but to do so would be entirely useless. It has been repeatedly said that a very liberal rule is to be applied when testing the sufficiency of a statement filed before a justice of the peace; and that any statement is sufficient if it seems to reasonably apprise the opposite party of the nature of the claim asserted against him, and is sufficiently specific

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and definite to bar another action on the same demand. [See Connelly v. Parrish, supra, l. c. 4; Dalton v. Railways Co., supra, l. c. 395; Rundleman v. Boiler Works Co., 178 Mo. App. 642, 161 S. W. 609; and authorities to which these cases refer.]

In Connelly v. Parrish, supra, it is said:

"Justices' courts are popular tribunals before which ordinary disputes can be adjusted without the aid of attorneys. And it would defeat the end of their organization if the rules of practice and pleading found necessary in courts of record were applied to their proceedings."

In Van Cleave v. St. Louis, 159 Mo. l. c. 579, 60 S. W. 1091, it is said:

"In favor of that popular tribunal which has been characterized as 'the people's court,' where those unacquainted with the technical rules and forms of pleading may and do go, without counsel, to settle and adjust their differences, this court has ever held that the requirements of the statute have been made and fulfilled, when the statement filed with the justice, however informal and awkward in expression, was sufficient to reasonably advise the opposite party of the nature of his or her claim, and sufficiently specific to be a bar to another cause of action, with the further qualifications suggested in some of our cases, as to the first test, that resort may be had to reasonable implication to support the statement."

Granting that plaintiff's statement of her cause of action shows that the general Statute of Limitations had run against her claim unless she could establish facts showing some exception operating to relieve against the bar thereof, is it necessary for her to plead such exception in order that the statement be sufficient as a pleading in a cause originating before a justice of the peace? We think not. The statement on file fully advises the defendant of the nature of the claim asserted against it, and is sufficiently specific to bar another action on the same demand.

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Nor do we think that it can be said that it wholly fails to state a cause of action, when measured by the standard by which it must be here tested, because of the fact, if true, that it shows that the general Statue of Limitations has run against the cause of action unless there is some exception thereto within which the case may fall when the evidence is adduced. The statement does not conclusively show that the cause of action is barred by the Statute of Limitations. As said in Burrus v. Cook, supra, there are many exceptions which will relieve against the bar of the statute; and it would seem to be contrary to the entire spirit of our law respecting proceedings before justices of the peace to hold that a plaintiff is bound to observe a technical rule of pleading requiring one or more of such exceptions to be pleaded, in order that the statement may be sufficient in law. As suggested, there was at one time some uncertainty, at least, as to the rule in this State on the subject, and it is not followed in some of the States. It appears not to have been the original common-law rule, but that which prevailed in equity and which was generally adopted in the Code States. [See 25 Cyc, 1394, 1395.] A layman instituting his own action before a justice of the peace could not be expected to know of the existence of the rule of pleading invoked and relied upon by respondent. Nor do we think that the law contemplates that he is to be held to be precluded from showing that his case is within an exception to the statute by failing to observe such rule.

There appears to be a wide distinction between a case, such as this, where the statute involved is presumably the general Statute of Limitations, and one where the statement shows upon its face that the action is barred by a *special* Statute of Limitations governing it, which is absolute and without exception. But whether a defendant could invoke such a statute in the precise manner in which defendant here attempted

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to invoke the general statute, we do not decide. [Revelle v. St. Louis, I. M. & S. Ry. Co., 74 Mo. 438.]

It is suggested by appellant's counsel that the objection interposed by defendant, and which the court sustained, was one in the nature of a demurrer; and that a demurrer is a thing unknown in proceedings in cases instituted before a justice of the peace. And it is further suggested that if a defendant be permitted to take advantage of the statute in this manner, where the action originated before a justice of the peace, then he should be required to specify the particular statute upon which he relies, as he would if demurring in an action begun in the circuit court. [Knisely v. Leathe, 256 Mo. l. c. 359, 166 S. W. 257.] But we need not here give consideration to these suggestions. We are of the opinion that plaintiff filed a sufficient statement of her cause of action, invulnerable to the attack made upon it; that she is privileged to adduce proof at the trial, if she can, going to show the existence of some such exception or exceptions as will relieve against the bar of the Statute of Limitations; and that, on the other hand, if defendant wishes to raise the point in question it must do so by either pleading the statute upon which it relies or by invoking the same in some appropriate manner at the trial.

For the reasons indicated, we rule that the trial court erred in sustaining defendant's objection and thereby forcing plaitiff to a nonsuit. And it becomes unnecessary to discuss other questions adverted to in the briefs.

The judgment is reversed and the cause remanded. *Reynolds, P. J.*, and *Thompson, J.*, concur.

ON MOTION FOR REHEARING.

ALLEN, J.—Respondent insists that in our opinion filed herein we inadvertently overlooked the fact "that the petition before the court for consideration in this case is not a statement filed in the justice court

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but an amended petition filed in the circuit court after appeal from the justice court."

It is true that the statement or petition which we had under consideration was not the original statement filed before the justice of the peace, but was an "amended petition" filed by plaintiff after the case reached the circuit court. We did not overlook this, but deemed it unnecessary to state that where an action originates before a justice of the peace, and is appealed to the circuit court, the sufficiency of an amended statement or petition in the circuit court is to be determined by the requirements of the law applicable to statements filed before justices of the peace. [See Conn Company v. Orr, et al., 150 Mo. App. 705, 131 S. W. 765.] When a case is appealed from a justice of the peace to the circuit court the general rules of practice in the latter court govern, but not the rules of pleading applicable to causes originating therein. [See Wendleton v. Kingery, 110 Mo. App. 67, 84 S. W. 102.] As to matters of pleading the case remains one wherein no formal pleadings are required, and the rule is not altered by the fact that an amended statement is filed in the circuit court.

With the concurrence of the other judges, the motion for a rehearing is overruled.

AMERICAN UNION TRUST COMPANY, Respondent, v. NEVER BREAK RANGE COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted November 14, 1916, Opinion Filed December 30, 1916.

1. **BILLS AND NOTES: Indorsement by Stamp: "Written Indorsement."** The indorsement of the name of a corporation, payee of a promissory note, on the back thereof, by means of a rubber stamp, was a sufficient "written indorsement," under Secs. 10,001, 10,002, R. S. 1909, defining when an instrument is negotiated and

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providing that the indorsement must be "written," where there was substantial testimony that such indorsement was ratified by the officers of the corporation, and especially is this true in view of Sec. 10160, defining "written" as including printed and "writing" as including print.

2. ———: **Indorsement in Blank.** Under Sec. 9980, R. S. 1909, a promissory note indorsed in blank by the payee is payable to bearer.

3. ———: **"Negotiation."** A promissory note payable to the maker and indorsed by him in blank is "negotiated," under Sec. 10,001, R. S. 1909 by sale and delivery to a third person.

4. ———: **Purchaser: Sufficiency of Evidence.** In an action on a promissory note, evidence *held* sufficient to warrant a finding that one to whom the note was sent by the maker was the purchaser of the same.

5. ———: **Bona Fide Holder: Instructions.** In an action on a promissory note, defended on the theory that the negotiation of the note was wrongful and in derogation of the rights of defendant, in that the note "was improperly, unlawfully, fraudulently and surreptitiously obtained from defendant," the court instructed the jury that if they found that defendant had delivered the note to one S, either as purchaser or as defendant's agent to effect a negotiation thereof, that S delivered it to one B for the purpose of enabling him to determine whether or not a bank with which he was connected desired to purchase it, and that plaintiff bought it from B, before maturity, for a valuable consideration and in the usual course of business, the jury should return a verdict for plaintiff, *unless they further believed from the evidence that, at the time plaintiff purchased the note, it had knowledge or notice that the negotiation of the note was wrongful and in derogation of the rights of defendant. Held*, that the italicized portion of the instruction is not vulnerable to the criticism that it permitted plaintiff to recover in the absence of *actual* knowledge or notice on its part that the negotiation of the note by B was wrongful.

6. **APPELLATE PRACTICE: Conclusiveness of Verdict.** The weight of and the effect to be given the testimony, in an action at law, is primarily for the jury and then for the trial court, and the verdict will not be disturbed by the appellate court if it is supported by substantial testimony.

7. **INSTRUCTIONS: Refusal: Covered by Other Instructions.** The refusal of a requested instruction is not error, where its substance is fully covered by the instructions given.

8. ———: ———: **Not Based on Evidence.** A requested instruction which is not supported by the evidence is properly refused.

9. **BILLS AND NOTES: Sufficiency of Indorsement: Custom: Instructions.** In an action on a promissory note, executed by a corporation and payable to its own order, defended on the theory that

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the note was indorsed merely by the name of the corporation stamped with a rubber stamp, the refusal of a requested instruction, that if the jury found that it was "unusual and not customary" for business corporations to use the name of the company stamped on the back of notes as an indorsement, then the name of defendant so stamped was sufficient notice that the note was not indorsed to make it the duty of plaintiff to investigate the authority under which such name was stamped, was properly refused, for the reason it omitted to state the facts necessary to establish a custom.

10. **INSTRUCTIONS: Custom.** An instruction which permits a finding to be predicated upon the nonobservance of a custom should state the facts necessary to establish the custom.

Appeal from St. Louis City Circuit Court.—*Hon. Daniel D. Fisher,* Judge.

AFFIRMED.

Connett & Currie and *O'Hallaron & Lowenhaupt* for appellant.

(1) The court erred in refusing defendant's request for a directed verdict. There was no evidence upon which the plaintiff was entitled to a judgment or, at least, the judgment should have been for the defendant. Secs. 10,001, 10,002, R. S. 1909. (2) Instructions numbers 1, 2 and 6, given at the request of plaintiff, are erroneous. They do not state the law correctly and there is no basis for them in the facts of the case. Revised Statutes 1909, sections 10,001, 10,154; Bank v. Phillip, Admr., 172 Mo. App. 404; Miners v. St. Louis, 178 S. W. 211; Bank v. Hohn, 146 Mo. App. 704. (3) Instructions number three and five given at the request of plaintiff, are erroneous. Sec. 10,001, R. S. 1909; Miners v. St. Louis, 178 S. W. 211; Merchants v. Insurance Co., 110 Mo. App. 62; 7 Cyc, pp. 791, 926. (4) The court erred in refusing defendant's instructions numbered 3, 6 and 8. The defendant's given instructions do not cure the error in plaintiff's instructions. Wilks v. Railroad, 159 Mo. App. 727; Pyburn v. Kansas City, 166 Mo. App. 152; Goode v. Coal Company, 167 Mo. App. 175; Wojtylak v. Coal Co., 188 Mo. 283; Frederick v. Allgaier, 88 Mo. 603; State v. Railroad, 236 Mo. 382.

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Elijah Robinson, Collins, Barker & Britton, C. E. Kimball, Jr., and *C. K. Rowland* for respondent.

(1) This court will not pass upon the sufficiency of the evidence; besides, appellant cannot raise his first point as to there being no evidence, without printing all the testimony. Rule 15, St. Louis Court of Appeals; Nash v. Brick Company, 109 Mo. App. 600; Furstenfeld v. Furstenfeld, 152 Mo. App. 734. The note is in legal effect bearer paper. Sec. 9980, R. S. 1909. (2) Appellant cannot raise the point of alleged insufficiency of evidence to support the instructions. See authorities under I. No adverse presumption arises from the use of the rubber-stamp endorsement. Horner v. Railroad, 70 Mo. App. 285; 4 Am. & Eng. Enc. of Law, 258. There is no error in the instruction as to what constitutes a holder in due course. Sec. 10022, R. S. 1909. Notice of infirmity must be actual; knowledge must amount to bad faith. Sec. 10026, R. S. 1909; Reeves v. Letts, 143 Mo. App. 199. (3) If the note was executed, respondent is presumed to be a holder in due course. Sec. 10029, R. S. 1909. The error, if any, is harmless. Schuepbach v. Gas Co., 232 Mo. 612. (4) The third instruction is based on the theory that the note was endorsed by the corporation through its agent. No adverse presumption arises from the use of the rubber-stamp indorsement. (supra, II.) There is no error in the fifth instruction. (5) Defendant's instructions numbered 3, 6 and 8 were properly refused.

REYNOLDS, P. J.—Action upon a note executed by the Never Break Range Company, payable to its own order, the note dated May 1, 1911, due six months after date, with interest from date at the rate of six per cent. per annum. The name of the maker, Never Break Range Company, was imprinted in the body of the note with a stamp bearing that name and at the foot of the note and apparently

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with the same stamp is stamped the name, "Never Break Range Co.," and written below this with a pen, "W. L. Culver, Prest." With the same stamp, apparently, and on the back of the note, is stamped the name, "Never Break Range Co." No individual or official signature, however, follows this.

In the petition upon which the case was tried, it is averred that the defendant negotiated that note and that thereafter and prior to its maturity plaintiff had purchased it for a valuable consideration in the ordinary course of business and it was delivered to plaintiff and that at all times since plaintiff has been the owner and holder of the note in due course. Averring demand for payment of the principal and interest and refusal to pay, and setting up why a copy of the note is filed instead of the original, judgment is prayed for the amount of the note, interest and costs.

The answer of the defendant denies the execution of the note or that defendant ever assigned it by indorsement prior to maturity thereof or at any time; denies that plaintiff is the owner and holder of it or that it had purchased any note of the defendant for a valuable consideration; alleges that the note had not been indorsed by the defendant; that it was a non-negotiable instrument; that defendant never received any consideration for it; that plaintiff now and at the time before the alleged or pretended purchase of the note, knew that the defendant had received no consideration therefor, and that the note was not negotiable and that it had not been indorsed by the defendant and knew that the note was improperly, unlawfully, fraudulently and surreptitiously obtained from defendant, and that no indorsement of the note was made by the defendant, all of which, it is averred plaintiff knew or had notice thereof.

Another defense was to the effect that the note had been replevied by defendant and was now in its possession, and that the action in replevin had not been tried and determined but was still pending, and

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defendant asked that all proceedings on this note be stayed until the determination of the action in replevin. As no attention seems to have been paid to this defense, it is unnecessary to notice it further. This answer was duly verified.

On a trial before the court and a jury, a verdict was rendered in favor of plaintiff for the amount of the note and accrued interest, and judgment following, defendant duly perfected its appeal.

Without dealing with the evidence in detail further than hereafter noticed, it is sufficient to say that it was directly contradictory on almost every material fact in the case. There is substantial evidence on behalf of plaintiff to the effect that the defendant company, desiring to raise money, made out three notes, of which that in suit was one, each for $5000, all signed and indorsed alike, and that a Mr. Churchman, acting for defendant, sent them by mail to one Sims, who was a note broker and representative of a bank in Memphis, Tennessee. As to whether they were delivered to Sims, as agent, to dispose of them, or as purchaser, is not clear; the evidence is both ways as to that. Sims handed two of them to a man named Bonds, in Kansas City, the president of the Night and Day Bank, to submit them to the board of directors of his bank there. Bonds took these two notes and disposed of one of them to the Night and Day Bank in Kansas City on or about May 3, 1911. Bonds turned over the proceeds of that note to Sims, but retained the other note. When Sims asked him to return it, he refused to do so, saying he would keep it for a few days and pay Sims for it, which he never did. In point of fact he negotiated it on his own account with the plaintiff trust company in Kansas City and kept the money, apparently; certainly never paid defendant or Sims any of it. Sims disposed of the third note to a Mr. Hendrey for $5000 in cash and bonds. According to the testimony for plaintiff, Mr. Richardson, the president of the respondent company at Kansas City, when

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Bonds, about May 2, 1911, presented this note for sale, called up the defendant company at St. Louis over the long distance telephone. The testimony of that president as to the conversation over the telephone with the representative of defendant will be set out later. As the result of that conversation the president of plaintiff company submitted the note to the finance committee of his company on May 3, 1911, the day after Bonds had left the note with him, and the finance committee, on the strength of the assurances which its president testified he had received from Mr. Culver and Mr. Churchman, bought the note, paying Bonds $5000 cash for it. Bonds disappeared and defend ant, as stated, has never received anything for the note, except so far as it was included with the $10,000 and possibly some other secureties that were turned over to it by Mr. Sims on account of the purchase, as he says, of the three notes calling for $15,000. That is practically the case.

There are five points relied upon for a reversal. Of these in their order:

First, the refusal by the court of the defendant's request for a directed verdict, it being claimed that there was no evidence upon which plaintiff was entitled to judgment or "at least the judgment should have been for the defendant," citing sections 10,001 and 10,002, Revised Statutes 1909. These sections are in our Negotiable Instrument Law. Section 10,001 defines an instrument as negotiated when transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer, it is negotiated by delivery; if payable to order, it is negotiated by the indorsement of the holder, completed by delivery. Section 10,002 provides that the indorsement must be written on the instrument itself or upon a paper attached thereto, the signature of the indorser, without additional words, being sufficient indorsement. We are unable to appreciate the force of the argument of the learned

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counsel for appellant that these provisions of the statute demanded and, under the evidence in the case, authorized a directed verdict for the defendant. There is substantial evidence to the effect that the name of the defendant was stamped on the face of the note by an agent authorized to stamp it and that the signature following the stamped indorsement of the name of the defendant on the face of the note is the signature of the then president of the defendant, whose authority to execute the note is not challenged. The same party who stamped the name of the defendant on the body of the note impressed that stamp on the back. It is true that no officer of the defendant, or any person representing defendant, attested the stamped name of defendant on the back of the note, and it is true that in a literal sense the indorsement of the name of defendant on the back is not "written." There is, however, substantial evidence in the case to the effect that before the plaintiff purchased this note it called up Mr. Culver, the president of the company, and asked him concerning the note, calling his attention to the indorsement on the back as only being with a rubber stamp and not signed by any officer of the company, and that Mr. Culver stated to Mr. Richardson, then the president of the plaintiff company, that it was all right; that they were willing to supply the indorsement but that Mr. Churchman was handling the matter directly, and Mr. Culver asked Mr. Richardson to hold the telephone for a moment until he (Culver) called Churchman. Mr. Churchman, according to Mr. Richardson, thereupon took up the telephone conversation and stated to Mr. Richardson that the paper was all right; that they (defendant) had issued it and would supply the indorsement on the back if Mr. Richardson's company desired it; that they, that is defendant, did not think it necessary but were willing to have an officer of the company supply the indorsement. Mr. Richardson further testified that Mr. Culver said to him over the telephone on that occasion,

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that they had made a great number of notes that way; that it was all right but if the plaintiff company wanted the indorsement of an officer of the defendant company, they were willing to supply that indorsement but they considered it all right, and according to the testimony of Mr. Richardson, Mr. Culver said substantially the same thing.

Moreover, an attorney, also an officer of the Night and Day Bank of Kansas City, testified that Mr. Sims, on the 2nd or 3rd of May, 1911, had in his possession these three notes of the Never Break Range Company, signed and indorsed as before stated, and had offered one of them to his bank. This officer called for Mr. Culver, president of the defendant at St. Louis, over the long distance telephone and the operator informing him that she had Mr. Culver on the line and that he was ready to talk, the attorney talked to a party at the other end of the line who said he was W. L. Culver, president of the defendant. The attorney told Mr. Culver that Mr. Sims had the three notes above described; that one of them had been offered to the Night and Day Bank for sale, and called his attention to the fact that the stamped indorsement of the name of the defendant company was not authenticated by any officer of defendant. Whereupon Mr. Culver said that if the bank purchased the note and would send it down he would put his signature as president under the rubber stamp indorsement; that it was an oversight that it had not been done; that the notes were all right and Mr. Sims was authorized to sell them. Whereupon the Night and Day Bank purchased one of the notes, paying for it in cash and bonds and these proceeds were turned over through Mr. Sims to the defendant. Mr. Culver, asked concerning this alleged conversation over the telephone with a representative of the Night and Day Bank of Kansas City, said that he did not remember having had but one conversation over the long distance telephone with any one at Kansas City, undoubtedly referring to the conversation

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which he admitted he had with Mr. Richardson. While it is true that there is no clear identification of Mr. Culver as the party with whom the Kansas City gentleman had this conversation, it does appear that on the strength of it, one of these notes, which had been in the hands of Sims, was purchased by the bank or some customer of the bank, and the note afterwards being presented to Mr. Culver, the stamped name of the defendant on the back as indorser was attested by him as president. That also occurred as to another of these three notes.

This was substantially the testimony in behalf of plaintiff of the fact that the indorsement on the back of this note in the name of the defendant company with a rubber stamp was an authorized indorsement by defendant, and if desired by plaintiff would be further verified and authenticated by the signature of an authorized officer of the defendant company.

That this indorsement was not "in writing" in the literal sense of the word "writing" is entirely immaterial. It has been many times held that affixing a rubber stamp to an instrument is sufficient in law to fulfill the requirement that the indorsement or the name must be written or in writing, if the stamp is affixed with the intent of using it as an indorsement. For illustration, see Horner v. Missouri Pac. Ry. Co., 70 Mo. App. 285.

In that case (l. c. 291) our court said:

"The word 'writing,' in law, not only means words traced with a pen or stamped, but printed or engraved or made legible by any other device," citing Henshaw v. Foster, 9 Pick, 312. In that case the Supreme Judicial Court of Massachusetts had before it the question as to whether a certain ballot, which had been tendered by a voter at an election, conformed with the Constitution of that State, which provided: "Every member of the House of Representatives shall be chosen by written votes." The elector had tendered a printed ballot, as it appears, and the court held that this was sufficient

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compliance with the constitutional requirement that the ballot or vote should be written.

Section 2783, Revised Statutes 1909, part of our statute generally referred to as the Statute of Frauds and Perjuries, provides that no action shall be brought in certain cases named, "unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him thereto lawfully authorized." This is substantially the English Statute of Frauds (29 Car, II, c. 3). Construing this, it has been held that a printed or stamped name is a sufficient signature, if adopted or intended as such. [20 Cyc, page 275, subdivision 3, and authorities there cited under note to that subdivision.]

Our Negotiable Instrument Act, however, section 10,160, Revised Statutes 1909, puts this question beyond debate, for it is there enacted that unless the context otherwise requires, " 'Written,' includes printed, and 'writing' includes print." All the elaborate argument by the learned counsel for appellant, therefore, that this was not a written indorsement as required by the law, is without merit, and whether this stamped name of the defendant on the back of the note constituted an indorsement by defendant depended upon the evidence as to the acts of the defendant in connection with placing its stamped name on the back of this note and subsequently so handling the note as to put it into circulation. That it did so, that it ratified its stamped name on the back of this note as its act, there is substantial evidence. Under substantial evidence in the case, to the effect that this indorsement by stamp had been ratified by defendant's proper officers, its effect, under section 9980, Revised Statutes 1909, it being an indorsement in blank, is to make the instrument payable to bearer.

Learned counsel for appellant argue with great earnestness that this note never became negotiable

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paper, and was never negotiated, as negotiable paper is defined in section 10,001, Revised Statutes 1909. But if it was indorsed with a stamp and that stamp held out to be put there as the act of the defendant and as an indorsement, and there was substantial evidence to that effect, then the note was negotiated when passed over by defendant to a third party, if that was done.

We rule this first point against appellant.

The second point urged by the learned counsel for appellant is that three instructions given at the request of plaintiff are erroneous in that it is claimed that they do not state the law correctly, and that there is no basis for them in the facts of the case. One of the principal objections made is that by these, or one of them, the jury are told they can find for plaintiff if, among other things, they find and believe from the evidence that the defendant delivered the three notes, which had been issued at the same time, that in controversy being one of them, to one Sims, "either as purchaser thereof, or as defendant's agent to effect a negotiation thereof for defendant's benefit." Those learned counsel contend very strenuously that there is not a particle of testimony in the case to show that Sims was the purchaser of these notes. That contention is disposed of adversely to the claim of those counsel by the testimony of Mr. Sims, which, as far as this point is concerned, is set out *verbatim* in the supplement abstract furnished by respondent. Mr. Sims, as noted, was the man to whom these three notes, the one in suit being one of them, were delivered by Mr. Churchman, the financial agent in the matter for the defendant. Mr. Sims was asked for what purpose Mr. Churchman had delivered these notes to him. He answered that he had bought the notes from Mr. Churchman. Asked, "You bought the notes from Mr. Churchman? A. Yes, sir." Further along Mr. Sims being asked if he had made any payments or given any consideration to any one for those notes at the time, testified that he had paid Churchman part on the notes,

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paid him $10,000; not for any particular one of the three notes but on account of all of them, which totaled $15,000, and asked if he had contracted to take these three notes and pay $15,000 for them, he answered, "Yes," that he had paid $10,000 on the three notes. Whereupon Churchman had delivered the three notes to him. That was a negotiation of them, if he purchased, as he said, and they were delivered to him. So that there was no error in this instruction in so far as it submitted to the jury the question as to whether the notes had been delivered to Sims, "either as purchaser thereof, or as defndant's agent to effect a negotiation thereof for defendant's benefit."

Counsel further contend that the first and second instructions given on behalf of plaintiff contain matter not at all pertinent to the case. We are unable to concede that. In the first one, after submitting to the jury the question as to whether these notes had been delivered to Sims either as purchaser or as defendant's agent to effect a negotiation thereof, the instruction is to the effect that if the jury found that thereupon the note in controversy was delivered by Sims to one Bonds, the person who sold the note to the respondent, along with another note of the defendant for the purpose of giving Bonds an opportunity to determine whether or not he or the bank with which he was connected might purchase the notes or one of them, and if the jury also found and believed from the evidence that the plaintiff bought the note from Bonds before maturity and for a valuable consideration and in the usual course of its business, the jury should find their verdict for plaintiff, unless they further believed from the evidence that at the time plaintiff purchased the note it had knowledge or notice that the negotiation of the note by Bonds was wrongful and in derogation of the rights of defendant. This latter part of the instruction is criticized because it is said that it required the purchasing bank, plaintiff here, to have

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had actual knowledge or notice that the negotiation of the note by Bonds was wrongful. We do not think that the instruction is subject to this construction. The word "actual" is not used in it and a jury of intelligent men were certainly capable of understanding that the fact of actual notice or knowledge was not required to be found. We do not think that either of these instructions is subject to the criticism made.

Practically the same criticism was made of other instructions given at the request of plaintiff, and that is the third point made by the learned counsel for appellant. We see no error to the prejudice of appellant in any of them. One of them, the third, told the jury that if they found from the evidence that the rubber stamp placed on the back of the note in suit was made by or under the direction of some officer or agent of the defendant authorized to use the stamp as an indorsement of the note, their verdict must be for plaintiff, unless they found from the evidence that before the negotiation of the note defendant notified plaintiff that defendant did not consider the rubber stamp indorsement binding. Another instruction (the fifth) also complained of, was to the effect that if the jury found from the evidence that before the plaintiff purchased the note in suit it called up over the telephone the office of the defendant company and talked with one Churchman, an employee or agent of the company, to whom plaintiff was referred by the president of the defendant company, and if the jury found from the evidence that Churchman told plaintiff that the rubber stamp indorsement was all right, and that defendant would supply other indorsement if desired, but that they did not think it was necessary, "then, under such circumstances, your verdict must be for the plaintiff, provided you further find that said Churchman had been authorized by the defendant to negotiate said note." We see no error in either of these instructions. There was substantial evidence to the effect that the stamp had been placed on the back of the note by one authorized to do so. Church-

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man, according to substantial evidence, was an employee of defendant and acting as its financial agent in these matters; was the one who had affixed this stamp on the back of the note, and there was substantial testimony that Mr. Culver, as president, had ratified it. It is true that Mr. Culver and Mr. Churchman, the clerk or financial agent of defendant, most emphatically denied this telephone conversation, as also one said to have been had between Richardson, Culver and Churchman at the Planter's Hotel in St. Louis, in which, according to Richardson, both of these gentlemen said the stamped name was all right and if Richardson required it to be done they would have an officer of defendant attest it. That left it a question of veracity between two sets of witnesses, depending on the credit which the jury gave them, and it is not for us, as an appellate court, to disturb a verdict where evidence is conflicting as here. The weight and effect to be given to that testimony is primarily for the jury, then for the trial court, and is in no manner with us as an appellate court in this action at law, so long as there is substantial testimony to support the verdict.

Error is assigned to the refusal of the court to give three instructions asked by defendant, numbered 3, 6 and 8. Number 3, in effect, told the jury that the name, "Never Break Range Co.," stamped upon the back of the note, raises no presumption of an indorsement of the note by the company, and it must be proved by a preponderance of the evidence that that name stamped on the back of the note was ratified and accepted by a duly authorized agent as the indorsement of the company, or their verdict must be for defendant. The substance of this instruction, so far as it goes, was fully covered by other instructions given, and its refusal is not reversible error. It was also unnecessary, for it appears that plaintiff, not satisfied with it, inquired about its validity.

The sixth instruction asked by defendant and refused was to the effect that Churchman had no power to indorse the note sued upon and that the name of

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the defendant stamped on the back thereof by him is not an indorsement thereof by the defendant, and the verdict must be for defendant, unless it has been proved by a preponderance of the evidence that such stamped name was ratified and approved by W. L. Culver, president of the defendant, as an indorsement by defendant. That instruction was properly refused. It was misleading as to the authority of Churchman to stamp the name on the back. There was evidence tending to show that he had such authority. As far as the rest of the instruction is concerned, going to the matter of ratification, it was fully covered, and correctly, in other instructions.

The eighth instruction asked by defendant and refused is to the effect that if the jury found from the evidence that it was unusual and not customary for business corporations to use the name of the company stamped upon the back of notes as an indorsement, then the name, "'Never Break Range Co.,' stamped upon the note, . . . was sufficient notice to the plaintiff that said note was not indorsed to make it the duty of plaintiff to ascertain whether or not said name was stamped upon or ratified by a duly authorized officer or agent of defendant as an indorsement of said note by the defendant." As said with reference to the other instructions, so far as this was correct, the points covered by it were covered by other instructions. Furthermore, there was evidence, as before noted, that plaintiff had made inquiry. The facts necessary to establish a custom are entirely omitted. The instruction was properly refused.

The last point made is that defendant's given instructions do not cure the error in plaintiff's instructions. In the first place, we have discovered no reversible error in the plaintiff's given instructions, and next, taking them in connection with the ones given at the instance of defendant, they correctly placed the law of the case before the jury on the facts in evidence.

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We see no reversible error to the prejudice of appellant. The judgment of the circuit court should be and is affirmed. *Allen* and *Thompson, JJ.*, concur.

JENNIE BOOMSHAFT, Respondent, v. DANIEL W. KLAUBER, Appellant.

St. Louis Court of Appeals. Submitted on Briefs, November 15, 1916. Opinion Filed December 30, 1916.

1. **LIBEL AND SLANDER: Elements of Offense: Publication.** In order to constitute a slander, the slanderous words must be heard by some person other than plaintiff and defendant.

2. **———: ———: ———: Instructions: Cure by Other Instructions.** In an action for slander, an instruction given for plaintiff, covering the whole case, authorizing a verdict for her on a finding that defendant uttered the slanderous words of and concerning plaintiff, in the presence of one or more persons, and that they were false, without requiring a finding that they were heard by a third person, was erroneous, in that it did not require a finding of publication; and the error was not cured by an instruction given for defendant, charging that if the alleged slanderous words were understood by the hearers as mere terms of abuse, and not as an accusation, the verdict should be for defendant, for, where plaintiff's instruction purports to cover the whole case, its omissions cannot be supplied, nor its errors cured, by other instructions given.

3. **INSTRUCTIONS: Omissions Cured by Instructions.** Where an instruction given for the plaintiff purports to cover the whole case, and authorizes a verdict on the facts therein hypothesized, but omits to require facts to be found that are essential to sustain the cause of action, the error cannot be cured, nor the omission supplied, by instructions given for defendant.

4. **———: Assumption of Disputed Facts.** An instruction which assumes that a certain state of facts is true or that a certain condition obtains, is erroneous, where the evidence of the one party affirms, and that of the other party denies, the existence of such state of facts or condition.

5. **———: Referring to Pleadings.** An instruction which refers the jury to the pleadings for certain facts to be found, is erroneous.

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Appeal from St. Louis City Circuit Court.—*Hon. George C. Hitchcock,* Judge.

REVERSED AND REMANDED.

Chester H. Krum for appellant.

(1) The verdict was against the evidence. (2) The verdict was against the instructions of the court asked by and given for the appellant. These instructions were given upon the theory that the situation justified the belief, that respondent's conduct showed she was dealing with stolen property. The words used were evidential of malice under the circumstances. Farley v. Thalheimer, 103 Va. 504; Ritchie v. Stenins, 73 Mich. 563. (3) The instruction as to the speaking of the words, given for respondent, was erroneous. This follows from the fact, that the petition did not state a cause of action. The instruction omitted the words "and hearing," admitted by the amendment to be essential. (4) The permission given to amend was altogether without authority. Section 1848, Revised Statutes, does not by its terms or by its intendment cover the amendment after verdict of a petition which does not state a cause of action. Bricken v. Cross, 163 Mo. 449-457.

H. A. Yonge and *Gustave Cytron* for respondent.

(1) The petition was good before the amendment. Under the statute it is only necessary to allege in an action for slander that the words were spoken of and concerning the plaintiff, and it is not necessary to charge that they were spoken in the hearing of any one. R. S. 1909, sec. 1837; Arwinger v. Fellner, 46 Mo. 276; Steiber v. Wensel, 19 Mo. 513. But clearly, under sec. 1851, R. S. 1909, the amendment of the petition after judgment was proper. (2) If the plaintiff's instruction is erroneous in failing to require the jury to find that any one heard defendant speak the words imputing the charge of thief to the plaintiff, it

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is cured by defendant's instructions which assume that the words spoken were heard by others, and submit to the jury the question as to what the hearers understood the defendant to mean by them. Anderson v. Railroad, 161 Mo. 411; Meadows v. Insurance Co., 129 Mo. 97; Shores v. St. Joseph, 134 Mo. App. 12. (3) The charge that plaintiff was a thief is slanderous *per se* and implies malice. Miller v. Dorsey, 149 Mo. App. 24; Carpenter v. Hamilton, 185 Mo. 603; Grimes v. Throp, 113 Mo. 625; Baldwin v. Frier, 46 Mo. App. 288; Israel v. Israel, 109 Mo. App. 366. (4) The question whether the words were spoken as mere words of abuse and so understood by the hearers was a question of fact which was submitted to the jury by instructions asked by the defendant, and their finding is conclusive on the defendant. Miller v. Dorsey, 149 Mo. App. 45. (5) The fact that defendant in charging plaintiff with being a thief accompanied the charge with an opprobrious epithet, not only does not relieve the charge of its slanderous nature, but aggravates it. Miller v. Dorsey, 149 Mo. App. 24; Israel v. Israel, 109 Mo. App. 366. (6) No explanatory statements were made by the defendant in connection with the defamatory charge, and the circumstances were not such that this court can say as a matter of law that the defendant did not intend to charge the plaintiff with being a thief. Israel v. Israel, 109 Mo. App. 366. Even the authorities cited by the appellant hold that the fact whether the words were spoken in such heat of passion, or under such provocation as to relieve them of their slanderous nature, is a question of fact for the jury. (7) Even if the circumstances tended to show that the defendant claimed that the plaintiff had bought his property from another, and was guilty of receiving stolen property, knowing it to have been stolen, the offense in law is punishable as for stealing the property, and is a species of larceny, and so closely related to the crime of larceny that this technical distinction should not prevail. Miller v. Dorsey, 149 Mo. App. 42.

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REYNOLDS, P. J.—Action for slander. The petition charges that in a certain discourse which the defendant had with plaintiff, relating to a certain load of scrap iron purchased by plaintiff, "and in the presence of divers good and worthy citizens of this State [defendant] falsely and maliciously said, rehearsed and proclaimed and loudly published these false, slanderous, malicious and opprobrious words of and concerning the plaintiff: 'I'll fix you. You —— of a —— and thief;' thereby charging plaintiff with having committed the crime of larceny." It is charged that defendant used these words falsely and maliciously and rehearsed and proclaimed and loudly published these false, slanderous, malicious and opprobrious words of and concerning plaintiff and that thereby defendant had charged plaintiff with having committed the crime of larceny. Averring injury to her name, etc., plaintiff prays judgment for actual and compensatory damages in the sum of $5000. (The words which we have supplied by dashes were given in full in the petition and in evidence, as well as in the instructions, and while vile and obscene are not counted upon as slander, so that it is unnecessary to set them out).

The answer was a general denial.

There was a trial before the court and a jury and a verdict for plaintiff for $150 actual and $250 punitive damages. When this verdict came in defendant in due time moved for a new trial on the ground that the court had erred in giving improper instructions asked by plaintiff and in giving others of its own motion, and that the verdict of the jury was against the evidence and the weight of the evidence. Defendant also filed a motion in arrest on the ground that the petition "does not state facts sufficient to constitute a cause of action in this: That while it is averred in the petition that the words complained of were spoken in the presence of divers good and worthy citizens of this State, it is nowhere averred that such persons either heard the words as spoken or understood them when

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they heard them." Pending the consideration of these motions for new trial and in arrest, plaintiff moved the court to be allowed to amend her petition by inserting the words "and hearing" after the word "presence," making the averment read: "In a certain discourse, which said defendant had with plaintiff relating to a certain load of scrap iron, purchased by plaintiff, and in the presence *and hearing* of divers good citizens of this State," etc. (Italics ours.) It is set out in this motion that the omission of the words "and hearing," from the petition was first called to the attention of plaintiff and the court by the defendant's motion in arrest of judgment; that the defendant did not file any demurrer to the petition, or object to the introduction of any evidence thereto, on the ground that it failed to state a cause of action, as alleged in his motion in arrest of judgment, and had raised the question of the omission of those words in the petition for the first time in his motion in arrest of judgment; and because the omission from plaintiff's petition was cured by proper instructions to the jury and the evidence adduced at the trial, without objection by defendant. The court sustained this motion and permitted the petition to be amended by the insertion of the words "and hearing" at the place referred to and overruled both the motion for new trial and in arrest, defendant excepting to all of this action of the court. Judgment thereupon followed on the verdict heretofore set out. From this defendant has duly appealed.

The learned counsel for appellant relies upon five points for the reversal of the judgment. The third point is, that the instruction as to the speaking of the words, given for respondent, was erroneous in that it omitted to instruct the jury that the words spoken were spoken in the hearing of others. The fourth point is that the trial court erred in permitting the amendment to be made to the petition by the insertion of the words "and hearing."

In the view we take of the case the only point necessary to determine is the third.

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There was evidence tending to show that plaintiff's husband was a dealer in scrap iron or junk, in the city of St. Louis, defendant apparently being a much larger dealer in these articles than plaintiff's husband. For brevity, we refer to the premises and business of plaintiff's husband as that of plaintiff, although plaintiff refers to it as "their" business, premises, etc. On the day of the utterance of what is counted on as the slander, defendant had been on a street car and saw one of his drivers, driving a team with a wagon attached, going south on Broadway. He remained on the car until he came to his own place of business and there was informed that one of his drivers had driven off with a load of iron belonging to defendant. Defendant at once ran to catch a Broadway car on Seventh street; missing that, he ran along Broadway and came to an entrance to the yard of plaintiff's place of business by which people drive into the yard with wagons. He saw his driver with a wagon loaded with scrap iron belonging to him in the yard and called to him, "This is a nice way that you are doing." As soon as the driver saw defendant coming into the yard, he jumped off the wagon and ran away and was not present at the difficulty between plaintiff and defendant. Defendant testified that plaintiff's husband was there at the time at scales which were in the yard. In this, however, he was contradicted by plaintiff and by a colored man, who was in the employ of plaintiff, and there is no pretense that plaintiff's husband heard or took any part in the conversation or quarrel which took place between plaintiff and defendant. There was, however, a colored man in the employ of plaintiff in the yard, handling a wheelbarrow on which the scrap iron, as it was taken out of the wagon by defendant's driver, was loaded, to be carried to plaintiff's scales and there weighed. According to the testimony of defendant this colored man, as soon as defendant came into the yard, ran across Broadway and was not in the yard and not present and in hearing at the time of the occurrence between plaintiff and defendant. On

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this latter point the testimony of defendant was positive; that is, he testified that neither the colored man nor anyone else was present or within hearing when the conversation took place between himself and the plaintiff. According to the defendant, plaintiff herself was not in the yard when he first went in there and accosted his driver but was in her house and came out after her colored employee had left. According to plaintiff, however, about nine o'clock in the morning of the day of the happening of the incident, a man drove up to their premises with a load of scrap iron and asked her if she would buy the iron. She said that she would, and told the driver to go out to his wagon and she would send a man out, referring to the colored man who worked for her. She accordingly sent this colored man out with a wheelbarrow to help the driver unload and put the iron in the yard. This colored man testified that he took one wheelbarrow load of iron and put it on the scales, and while he went out to get the rest of the iron, defendant came through the yard very fast. Plaintiff testified that she did not see defendant as he entered, as she had her back turned to the scales, and that defendant ran over to the scales and said something that she did not hear. When plaintiff heard defendant talking she started towards him, when defendant said to her, "What business you have to buy my iron?" Plaintiff said, "I didn't know it was your iron." Defendant said, "Why, you are a liar, you did know it was my iron." Plaintiff said, "No, sir; I did not." Defendant said, "Why, everybody knows Klauber's team; everybody in St. Louis knows Klauber's team." Plaintiff said, "I didn't see any name on your team. I seen it was a coal wagon standing there. I didn't know whether it was your team or anyone else's. If you don't fuss, you can have it back." To which defendant said, "No, I don't want it back. I will fix you, you ——— of a —— and thief." Defendant then walked up and down the yard and kept on talking and, according to plaintiff and the colored man, repeated the

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offensive words several times, walking up and down the yard and talking to himself. According to plaintiff and the colored man, defendant "was awful mad" and red in the face. Defendant finally left the yard and went out on the street. The colored man testified very positively that he was present and heard the defendant use the language counted on, and he repeated it word for word as testified to by plaintiff.

It thus appears that there was a sharp conflict in the testimony on behalf of plaintiff and that of defendant as to whether the slanderous words were spoken in the hearing of a party other than plaintiff. On that state of the evidence the court, at the instance of plaintiff, gave the instruction complained of, that instruction telling the jury that if they found from the evidence that on the day named "and in the presence of one or more persons, in a conversation then and there had between plaintiff and defendant in reference to some scrap iron purchased or about to be purchased by plaintiff, which defendant claimed was his iron, the defendant falsely and maliciously used and spoke the words of and concerning the plaintiff (quoting them), your verdict must be for the plaintiff." It will be noted that this instruction did not direct the jury to find that the words spoken had been heard by any third person.

It is further to be noted that the averments in the motion made by plaintiff for leave to amend the petition by interlining the words, "and hearing," correctly state the matters therein set out as to what had occurred at the trial of the case up to the time of filing that motion, save as to what the instruction required. Newell, in his work on Slander & Libel (3 Ed.), sec. 234, p. 279, says:

"It is no publication when the words are only communicated to the person defamed; for that cannot injure his reputation. A man's reputation is the estimate in which others hold him; not the good opinion which he has of himself. The communication, whether it be in words or by signs, gestures or caricature, must

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be intelligible to such third person. If the words used be in the vernacular of the place of publication, it will be presumed that such third person understood them until the contrary be proved. And it will be presumed that he understood them in the sense which such words properly bear in their ordinary signification, unless some reason appear for assigning them a different meaning."

Townsend on Slander & Libel (4 Ed.), p. 83, sec. 95, says:

"Every communication of language by one to another is a publication. But to constitute an *actionable publication,* that is, such a publication as may confer a remedy by civil action, it is essential that there be a publication to a *third person,* that is, to some person other than the author or publisher and he whom or whose affair the language concerns. . . . No possible form of words can confer a right of action for slander or libel, unless there has been a publication to some third person."

At page 88, section 107, the same author says:

"The requisites of *an oral publication* are: (1) that the language be spoken to or in the presence of at least some one third person. . . . No possible form of words can be the basis of an action for slander if at the time of their utterance the only persons present are the speaker and the person to whom or whose affairs the language concerns. (2) The third person present must *hear* the language spoken. Whether the third person present at the speaking did or did not hear the language spoken is, in every case, a question of fact. And this is not the less the rule because where the speaking is in the presence of a third person, under such circumstances that he might have heard what was spoken, he may, as a rule of evidence, be assumed to have heard it, until it be shown that he did not hear. The burden is on him who alleges a publication to establish that the third person heard the language spoken. (3) The third person must understand the language (sec. 96)."

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Referring to this last or third element, it is said by the same author at section 96:

"There cannot properly be said to be a communication of language by one to another, unless that other understands the signification or meaning of the language sought to be communicated. When we say the language must be understood by the one to whom it is published, we mean only that the matter published must be in a language to which the person to whom it is published can interpret to some meaning. To one who does not understand the language in which a publication is made, it is as to him nothing more than unmeaning sounds or signs, and not language." (The italics in the foregoing citations from Townsend are those of that text-writer).

Our own court in Gold v. S. Pian Time Payment Jewelry Co., 165 Mo. App. 154, 145 S. W. 1174; Traylor v. White, 185 Mo. App. 325, 170 S. W. 412; Walker v. White, 192 Mo. App. 13, 178 S. W. 254, and Frazier v. Grob, 194 Mo. App. 405, 183 S. W. 1083, as also Wright v. Great Northern Ry. Co., 186 S. W. 1085, having under consideration the subject of libel or slander has so held. So our Supreme Court held in Caruth v. Richeson, 96 Mo. 186, 9 S. W. 633, and the Kansas City Court of Appeals in Cameron v. Cameron, 162 Mo. App. 110, l. c. 114, 144 S. W. 171. In the cases of Traylor v. White, supra, and Walker v. White, supra, an examination of our files shows that the petitions in the cases averred that the words spoken and published of and concerning the plaintiff by the defendant were spoken "in the presence and hearing of divers persons;" and in each of them, as will be seen by reference to the decisions as reported, there was evidence that the actionable words had been spoken not only in the presence, but in the hearing, of divers and sundry persons other than the plaintiffs. But in each case instructions given on behalf of plaintiffs and purporting to cover the whole case were held to be erroneous in that they authorized a verdict for plaintiffs on a mere finding that the defendants had uttered the words

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of and concerning plaintiffs, without also requiring the jury to find that the words were spoken in the presence of and heard and understood by others, although the evidence there showed that the words were spoken in the hearing of others and that they understood them.

Our court, in Traylor v. White, supra, l. c. 330, said: "It is certain there can be no slander without publication of the words spoken. It must be shown that the slanderous matter was communicated to some third person, who understood it, since, otherwise, there is no publication."

In those cases it was urged, as here, that the error in plaintiff's instructions had been cured by defendant's instructions, which assume that the words spoken were heard by others. That may also be said, and so it is urged, in the case at bar as to the instructions given in behalf of defendant, one of them telling the jury that although they may believe that the defendant used of and concerning the plaintiff the word "thief," as alleged in the petition, "yet if the jury believe from the circumstances and the connection in which the word was used and the other words with which it was associated that it was merely used as a term of abuse and not intended as the truth, or that the words were understood by the hearers as mere terms of abuse and not as being intended to charge as a fact that plaintiff was a thief, then the jury should find for the defendant." So that we have here the same situation presented as in the cases of Traylor and Walker, above cited, that is, instructions given at the instance of defendant which included as a fact to be found that the words had been uttered in the hearing of others. Our court held in each of the cases that this did not cure the defect in the instructions of the plaintiffs, those instructions undertaking to cover the whole case. That is the situation here. We feel bound by authority to hold that the instruction here given at the instance of plaintiff, and which we have set out substantially as given, demands a reversal of the judgment in this case.

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We do not agree with learned counsel for defendant that an amendment cannot be made in a petition after verdict.

Whether, under the provisions of section 1848, Revised Statutes 1909, an amendment to the petition can be made after verdict, we need not here decide. [See, however, Budd et al. v. Hoffheimer, 52 Mo. 297, l. c. 303; Blair v. Chicago & Alton R. R. Co., 89 Mo. 383, l. c. 389, 394, 1 S. W. 350; Cabanne v. Spaulding et al., 14 Mo. App. 312, l. c. 314, the latter construing what are now sections 1848 and 1851, Revised Statutes 1909, as also Bricken v. Cross, 163 Mo. App. 449, l. c. 457, 64 S. W. 99.]

The difficulty that meets us here, and it is fatal to respondent, is, that the jury never passed upon the case as it was presented with this amendment, which consisted in inserting in the petition, and after verdict, the words, "and hearing." Whether the slanderous words were uttered in the hearing of any party other than plaintiff was sharply controverted in the case at bar. The plaintiff and her employee, the colored man, it is true, testified that the words were uttered in the presence of this colored man and were heard by him. It is also true that no objection was made at the trial to this line of testimony, nor was the petition, as it stood before the amendment, attacked at the trial nor until afterwards, when it was attacked by the motion in arrest, filed after verdict. But it is also true that the defendant flatly and most positively denied that anyone was present but himself and the plaintiff, or within hearing of them, at the time he is alleged to have uttered the words complained of, coupling that with a denial of ever having uttered the slanderous word, or any one of like import. It was, therefore, for the jury, under such a state of facts, to have determined this matter on the credibility of the witnesses. The Kansas City Court of Appeals, in Cameron v. Cameron, supra, l. c. 114, where a third person, one Curry, admitted by both parties to the action to have been present during the conversation when the slanderous words were

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said to have been uttered, and who testified that he heard and understood all that was said, but denied that the defendant had uttered the slanderous words, held that his denial "was not conclusive and possessed no greater evidentiary force than that of offering opposition to the affirmation of plaintiff that the words were spoken and were heard and understood by Curry. The question of the credibility of the defendant and his witness as well as the truth of their account of the quarrel were issues of fact for the jury to solve." It was therefore held in that case, that the court did not err in overruling the demurrer to the evidence on the ground that the third person denied that the slanderous language had been used. But in the case at bar the court, in the instruction given at the instance of plaintiff, and which, as before said, purported to cover the whole case, did not submit to the jury the determination of the credibility of the testimony as between plaintiff and her witness on the one side and that of the defendant on the other, as to whether that witness or any party other than plaintiff had heard the slanderous word. That was of the very gist of the action—the very foundation of the claim of "actionable publication." True the court told the jury that plaintiff was entitled to recover, if the slanderous word was spoken "in the presence of one or more persons." It might well be that they were spoken in the presence of a third party, but where, as here, the defendant emphatically denied that any third party heard the conversation or was present who could possibly have heard the language used, it was for the jury to determine that very important fact. By this instruction, as asked and given at the instance of plaintiff, the verdict of the jury is not responsive to this very material issue.

As the cause is to be remanded it is well to call attention to an error in the second instruction, not indeed raised by learned counsel for appellant before us, but which we notice ourselves so that if another trial is had, it will not be repeated. That error is in

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the second instruction given at the instance of plaintiff, which told the jury that if it found from the evidence that defendant "spoke the slanderous words as charged in the petition, then the law presumes they were spoken maliciously, and it is unnecessary to prove any express malice in order to warrant a verdict for plaintiff." The phrase, "as charged in the petition," in this instruction is improper. So it has been held in case after case by our courts.

For the error which we have pointed out in the main instruction which was given at the instance of plaintiff, we are compelled to reverse the judgment. That is accordingly done and the cause remanded. *Allen* and *Thompson, JJ.*, concur.

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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

MARCH TERM, 1917.

EDITH DREIBELBISS, Respondent, v. J. C. BANNER, Appellant.

Kansas City Court of Appeals, April 30, 1917.

1. **BREACH OF PROMISE: Reiteration: Breach: Reconciliation.** A contract of marriage made during a protracted courtship, from the nature of the parties and of the courtship itself, is one that is constantly being restated or reaffirmed, but it is one contract, not separating into distinct agreements at each protestation. And if there be a breach followed by reconciliation and renewal of promise, the original contract continues.

2. ———: **Rescission: New Contract: Substitution: Seduction: Evidence.** A contract of marriage may be mutually rescinded like any other contract. If afterwards another engagement is made it would constitute a new agreement. But a refusal to comply by one and an institution of an action for damages by the other, and a reiterated promise by the former, immediately followed by a dismissal of the action and then another refusal followed by re-instituting the action is not a rescission; nor is it a substitution of a new contract for the old, and seduction following the first promise, but not repeated after the last, may be given in evidence on the second action.

3. ———: **Instruction: Former Chastity.** An instruction authorizing allowance of damages for seduction in a breach of promise action should include a hypothesis whether the plaintiff was formerly chaste. But if such hypothesis is stated in defendant's instructions it will suffice.

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4. ———: **Unsigned Memorandum: Abstract.** Where error is charged in admitting in evidence an unsigned written memorandum and the appellant omits to include the paper in his abstract, the error cannot be noticed on appeal.

5. ———: **Excessive Verdict.** In an action for breach of promise where seduction and abortion appear together with a fraudulent renewal of the promise after once breaching the contract seven thousand and five hundred dollars is not an excessive verdict.

6. ———: **Argument: Remarks of Counsel.** In the argument to a jury in an action for breach of promise it is not reversible error for counsel for plaintiff in referring to the defendant, to say, "If you remove his shirt you will find written plainly across his back 'without recourse.'"

Appeal from Linn Circuit Court.—*Hon. Fred Lamb*, Judge.

AFFIRMED.

Burns, Burns & Burns, Sebree, Conrad & Wendorff and *Ray B. Thomson* for appellant.

Atwood & Hill and *Bresnehan & West* for respondent.

ELLISON, P. J.—Plaintiff's action is for breach of promise of marriage. She recovered judgment in the trial court.

It appears from the evidence that defendant began to court her in the year 1913, and that shortly they became engaged to be married; each promising to marry the other. That these promises were repeated from time to time during the courtship. That during this time defendant seduced her and continued his illicit relations, all the time renewing his promise of marriage. Finally, without cause, he broke his promise and refused to marry. Plaintiff then brought an action for breach of promise, charging the seduction in aggravation. Then defendant sought her out, persuaded her to dismiss the action and again promised to marry her, but there was no further illicit relation. Again he broke his promise and again he re-

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fused to marry. Thereupon she brought the present action in which the original promise and seduction and breach of the original promise is alleged, together with his subsequent promise and refusal.

One of the chief points made against the judgment is that when defendant refused to marry plaintiff and she accepted the refusal as a breach and instituted her action, the contract was at an end; and the subsequent engagement and promise was a new contract which was declared on as such and that as there was no seduction connected with the last promise, it was error to allow any evidence or enhancement of damages on account of seduction.

Defendant has cited us to an array of authority that a new, or substituted contract is the contract which must be pleaded and depended upon for recovery. That the substitution of the second for the first, is an abandonment of the latter, the substitution and abandonment becoming the consideration supporting the new contract.

But, in our opinion, the facts pleaded do not show a new contract. They show the same contract renewed, restated, or reaffirmed at different times, A contract of marriage which is made during a protracted courtship, or which is followed by courtship, from the very nature of the contract and the contracting parties, is one that is being constantly restated with no thought of anything more than a reaffirmation of the original promise. "It may be that one or the other of the parties is guilty of a breach. If reconciliation and new promise follow, the breach is waived. The contract continues." [Garmong v. Henderson, 112 Maine 383; 9 Corpus. Juris. 333.]

It is true that a contract of marriage may be mutually rescinded like any other. But a refusal to comply by one and the institution of an action for damages by the other, and a reiterated promise by the former, immediately followed by a dismissal of the action and then another refusal, followed by reinstituting the action, is not a rescission, nor is it a substi-

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tution of a new contract for the old, and seduction following the first promise, but not repeated after the last, may be given in evidence on the second action.

Defendant must have recognized this as the law for he did not state such point during the trial, nor did he object to the evidence offered in proof of the seduction, and he is thus cut out of any right to bring it forward on appeal.

Evidence was heard tending to show that plaintiff previously to her intercourse with defendant was unchaste. While this was not credited by the jury, yet it should not be shut off from consideration. In this connection defendant claims that error was committed in plaintiff's instruction No. 3, authorizing the allowance of damages for the seduction, without qualifying it with the hypothesis of her being chaste prior to defendant's conduct (Clemons v. Seba, 131 Mo. App. 378). But that qualification was expressly submitted to the jury in more than one of defendant's instructions, which relieves the case from error in the respect mentioned.

Defendant complains of the action of the court in admitting in evidence an unsigned memorandum made by the doctor, to whom defendant sent her, in reference to an abortion he committed on her. The preliminary evidence leading up to its admission seems to justify the court. But we are not in position to pass definitely on the point, since defendant has left the paper out of the record. It was his duty as an appellant to insert it in the abstract. [State ex rel. v. Thomas, 245 Mo. 65.]

The foregoing disposes of all objections made to the judgment in defendant's "points and authorities," except that the verdict is against the weight of the evidence, that it is excessive, and improper remarks of counsel. We must overrule each of these. The weight of the evidence was for the jury; but in passing on the point of excessiveness of the verdict we have examined the evidence and find no cause for the claim that the weight of it was against plaintiff's case.

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The whole matter rested upon the belief of the jury.

The verdict was for $7,500. The evidence seems to have satisfied the jury that she was the innocent and injured party. The treatment she received at his hands could scarcely be more aggravated. She was shown to be a good woman, led astray by defendant's false promises, with the most humiliating and dangerous consequences. He cast her aside. She brought an action against him. He then persuaded her to dismiss the case by renewing his false promises and then almost immediately breaking them. We think the jury did not unduly measure her wrong.

The remark of counsel in referring to defendant, in course of argument, to which exception was taken was that. "If you remove his shirt you will find written plainly across his back, 'without recourse.'" We are not prepared to say that this was so improper considering the character of case and the defense made, as to justify a reversal of the judgment. If counsel had asked the jury to look at defendant's forehead and see those words written thereon, probably nothing would have been thought of it. What was said was substantially the same thing, except that it involved a little more ceremony. At any rate, the court sustained the objection made to the remark and there the matter ended. Defendant did not ask a reprimand.

Looking to the whole record we find the law of the case properly applied. The questions of dispute as to the facts were properly submitted to the jury and we must be content with the verdict. The judgment is affirmed. All concur.

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TERMINAL ICE AND POWER COMPANY, Appellant, v. AMERICAN FIRE INSURANCE COMPANY, Respondent.

Kansas City Court of Appeals, April 30, 1917.

1. **FIRE INSURANCE: Ownership of Property Insured.** The acceptance of a fire insurance policy containing a provision which declared it should be void and of no effect "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground now owned by the insured in fee simple" is equivalent to a declaration that the insured was the unconditional and sole owner of the building insured and of the fee simple title to the ground, and that if such declaration were not true, the policy was void from the beginning.

2. ———: ———: **Fee Simple.** The term "fee simple" has never been used to distinguish between legal and equitable estates, but to define the quantity and duration of estates and to denote the largest estate in land known to the law.

3. ———: **Mortgage: Breach of Condition.** A mortgage being a mere lien on the land does not affect the quality of the fee simple estates of the mortgagor and until the mortgagee enters for breach of the condition, the mortgagor continues to be the owner of the estate and cannot be regarded as the owner of less than a fee simple title.

4. ———: **Change of Ownership: Option on Property Insured.** Where the insured gives an option before a loss by fire occurs, to another to purchase the property insured, no breach of the provisions of the policy concerning changes of interest in the property insured, other than by the death, of the insured, is committed, such option not being exercised until after fire.

5. ———: **Foreclosure on Sale of Property Insured: Policy Void.** The advertisement of property for sale under a deed of trust after a policy of insurance has been issued thereon, with the knowledge of the insured, renders the policy void, if it contained a provision to the effect that the policy shall be void "if, with the knowledge of the insured, foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy by virtue of any mortgage or deed of trust."

6. ———: **Cloud on Title.** The sale of the property insured under an execution, constituted only a cloud on the title, and not a complete transfer of the property, under the facts disclosed in this case, and the insured was not thereby prevented from recovering on the insurance policy the property having been destroyed by fire subsequently to the sheriff's sale.

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7. ———: **Notice of Encumbrance Waived.** The clause in a rider on a fire insurance policy providing that "notice of encumbrance waived" has no reference to the clause in the body of the policy providing that the policy should be void if foreclosure proceedings be commenced, or notice of sale given, under a mortgage or deed of trust. That clause refers to encumbrances and not to a sale, or notice of a sale under a mortgage or deed of trust.

8. ———: **Waiver: Unearned Premium.** Where a provision in the policy provides that if the policy is cancelled or becomes void, the premium having been actually paid, the unearned portion shall be returned on surrender of the policy, and the insurer knew nothing of the ground of forfeiture until after the fire it cannot be deemed to have waived the forfeiture provisions of the policy by reason of the fact that it has failed to return the unearned portion of the premium, as the nature of this contest shows no indication of any surrender of the policy, but, on the reverse, an earnest effort to enforce it. Hence, the conditions have not yet arisen which would require the defendant to make a return of the unearned premium.

Appeal from Jackson Circuit Court.—*Hon. Allen C. Southern,* Judge.

AFFIRMED.

Lathrop, Morrow, Fox & Moore, and *Boyle & Howell* for appellant.

Fyke & Snider for respondent.

BLAND, J.—This is an action on a policy of fire insurance issued to plaintiff by defendant September 20, 1912, on a two-story building and appurtenances which were a part of an ice manufactory plaintiff owned Kansas City. The plant was in operation but this particular building was not being used and was insured as an unoccupied building. At the time of the fire which wholly destroyed the property the policy, which was issued for a term of one year, had not expired, and five other policies issued by different insurance companies and insuring the same building were held by plaintiff and were in force when it was destroyed. All of the companies refused to acknowledge liability and adjust the loss, plaintiff

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brought separate suits to collect the insurance, suffered defeat in the circuit court and appealed each case to this court. The cases were submitted at the same time, have common issues, and our decision in the instant case will dispose of the controlling questions in the others.

The policy, in the standard form, contains the following conditions and agreements which are the basis of the principal defenses interposed in the answer: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the interest of the insured in the property be not truly stated herein, or if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple, or if with the knowledge of the insured foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy by virtue of any mortgage, or trust deed, or if any change other than by the death of the insured take place in the interest, title or possession of the subject of insurance whether by legal process or judgment, or voluntary act of the insured."

The answer alleges breaches of the foregoing provisions at the time of the loss, as follows: First, that after the policy was issued and before the loss the property was advertised for sale under a deed of trust with the knowledge of plaintiff and without provision therefor being indorsed on the policy and that such advertisement was being published at the time of the loss; second, that the interest of plaintiff in the property was not truly stated in the policy; third, that the building insured was on land not owned by plaintiff in fee simple and, fourth, that a prohibited change in the interest and title occurred in virtue of an option which plaintiff, after the policy was issued, gave to another corporation—the City Ice Company—to purchase plaintiff's interest in the property, "and that thereafter the said contract, or option, was exer-

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cised by the said City Ice Company and whatever interest or title, if any, the said plaintiff had in said property was purchased by the City Ice Company and conveyed by the said plaintiff to it . . . and that at the time of the fire plaintiff had no interest in the subject of insurance, etc."

The reply is a general denial and a plea of waiver. The cause was tried without the aid of a jury and the views of the court on issues of law and fact were clearly defined in rulings on declarations of law asked by plaintiff.

The material facts of the case chronologically stated are as follows: The property insured was a part of a manufactory owned by W. F. Lyons who in 1908 transferred it to a corporation known as the W. F. Lyons Ice and Power Company of which he was the principal stockholder and moving spirit. The corporation began its business career (which was shortlived and disastrous) by issuing and selling bonds for $100,000 which it secured by a first mortgage on all its property. Afterwards on November 5, 1909, it further encumbered the property with a second mortgage or trust deed executed and delivered to John H. Lynds, trustee, to secure notes for $20,000 for money borrowed for the use of the company. These notes were owned by Howard Vanderslice, J. S. Chick, John H. Lynds and Fred Wolferman and in December, 1909, the control of the corporation and its property and affairs was surrendered to these four holders of the second mortgage notes whose number was reduced to three by the withdrawal of Wolferman who sold his interest to the others. In 1910 suit was brought to foreclose the first mortgage and that suit was pending when the policy in question was issued. To protect their interests as second mortgagees, Vanderslice, Chick and Lynds bought and became the owners of large part of the bonded indebtedness and thereby obtained control of the foreclosure suit. They also became the owners of all of the capital stock of the W. F. Lyons Ice and Power Company, and Lyons

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retired from the corporation and its affairs. At that time the corporation was on the verge of bankruptcy, had lost its credit and had a bad reputation in the business world. Vanderslice, Chick and Lynds, in an obvious effort to word off the attacks of creditors as well as to escape other consequences of such bad reputation, had the name of the corporation changed to the Terminal Ice and Power Company; early in 1911, and incorporated another company under the name of the Sheffield Ice Company which operated the factory under a lease from the Terminal Company for a term of two years. Both of these companies were controlled by Vanderslice, Chick and Lynds, who owned all the stock of both, the stock of the Sheffield Company being paid by the transfer to that company of the second mortgage notes.

About the time of these changes, i. e. April 3, 1911, the Gate City Bank, a general creditor of plaintiff was given judgment for about $1700 in an action against the Lyons Company as defendant, and had execution issued and levied on the factory including the building afterwards covered by the policy in suit. The property was sold at execution sale and bought in by the bank which received the sheriff's deed April 5, 1912. Thereafter the bank made unsuccessful attempts in court to gain possession of the property and did not wholly discontinue such efforts until October 6, 1913, when it compromised its demands with the attorney for Vanderslice, Chick and Lynds for $200 in cash and executed a quitclaim deed as directed by the attorney.

On April 2, 1913, while the factory was being operated by the Sheffield Company, plaintiff gave a written option to another corporation—the City Ice Company—to purchase the plant and in February, 1913, executed a lease to the City Ice Company under which that company as lessee took possession of the property about June 1, 1913, and proceeded to operate the factory. The fire occurred June 17th and on June 30th the City Ice Company formally notified plaintiff in writ-

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ing of its decision to exercise the option and afterwards the sale was consummated.

At about the time the City Ice Company took charge of the plant under the lease and shortly before the fire, Vanderslice, Chick and Lynds, acting in the name of the Sheffield Company, the book holder of the second mortgage notes which then amounted to about $30,000, had the trustee, in the deed of trust securing the notes, advertise the plant for sale under the terms of that trust deed.

This sale was made about two weeks after the fire and the property was sold to Vanderslice who bid $2,000 and a trustee's deed was executed and delivered to him by Lynds, the trustee. The attorney for Vanderslice, Chick and Lynds testified that the advertisement and sale of the property under the second trust deed was pursuant to the request of all the parties in interest, viz., his clients and the City Ice Company, who desired "this title straightened out." We understand him to mean that the purpose of the sale was to secure the plant against the attacks of the general creditors of the old Lyons Company in order that the property might be sold and conveyed, clear of all incumbrances, to the City Ice Company.

This sale could not affect the lien of the first mortgage but since the bonds it secured were owned or controlled by Vanderslice, Chick and Lynds, that mortgage and the suit to foreclose it did not stand in the way of the purpose to convey the property clear of incumbrances. The value of the entire plant appears from the evidence to have been approximately $110,000, or about $20,000 less than the total mortgage indebtedness. Consequently there was no equity in the property to which general creditors could look for the payment of their demands. This condition of insolvency resulted from the management of Lyons. The activities of Vanderslice, Chick and Lynds, after they secured control of the corporation appear to have been prompted by a purpose to extricate the corpora-

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tion from its pecuniary difficulties without resorting to bankruptcy proceedings to the end of preventing loss on their holdings under the second deed of trust.

Passing, for the present, the subject of the effect on the interest of plaintiff in the property of the execution sale procured by the Gate City Bank we shall discuss and determine the issues raised by the specific defenses set forth in the answer. First we shall consider the defense that plaintiff, at the time of the issuance of the policy, was not the sole and unconditional owner of the building insured, nor the owner in fee simple of the ground on which the building stood and, therefore, that the policy was void under the provision which declared it should be void and of no effect "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple."

It may be conceded for argument that the acceptance by plaintiff of a policy containing such provisions was equivalent to a declaration that plaintiff was the unconditional and sole owner of the building insured and of the fee simple title to the ground and that if such declaration were not true, the policy was void from the beginning. [Mers v. Insurance Co., 68 Mo. 127.] With this concession the question to arise is this: Was plaintiff, when the policy was issued, the sole and unconditional owner of the building and the owner of the fee simple title to the ground? The change of the corporate name of plaintiff from the W. F. Lyons Ice & Power Company to the Terminal Ice & Power Company worked no change in the entity of the corporation which remained the same.

Plaintiff was the owner both of the building and the ground and was the sole and unconditional owner of the building and the owner of the fee simple title to the ground, unless we shall find that the ownership of the building and the title to the ground were made conditional by the two mortgage liens.

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The term "fee simple" has never been used to distinguish between legal and equitable estates but to define the quantity or duration of estates, to denote the largest estate in land known to the law. A mortgage being a mere lien on the land does not affect the quality of the fee simple estate of the mortgagor and until the mortgagee enters for breach of the condition, the mortgagor continues to be the owner of the estate and cannot be regarded as the owner of less than a fee simple title. [Leather Company v. Insurance Co., 131 Mo. App. 701; Kinkele v. Wilson, 29 N. Y. Supp. 27; Loventhal v. Insurance Co., 112 Ala. 108; Conn. Fire Ins. Co. v. Colo. & Co., 116 Pac. (Colo.) 154; Ark. Ins. Co. v. McManus, 110 S. W. (Ark.) 797.]

Since the policy did not mention liens and incumbrances the proviso that plaintiff must be the owner of the ground in fee simple was not breached by the existence of the two mortgage liens. The same rule controls the definition of the term "unconditional and sole ownership" of the building. That provision did not refer to incumbrances or liens, but to the character and quality of the title. As is said in Assurance Co. v. Nalls, 44 S. E. 896; "The authorities are practically unanimous to the effect that an incumbrance is not an estate in, or title to the property within the meaning of the provision that if the interest of the assured be other than an unconditional or sole ownership the policy shall be void." [See also Leather Co. v. Insurance Co., supra; 2 Cooley's Briefs on Insurance, 1378; 19 Cyc. 694; Insurance Co. v. Colo., etc. Co., supra.]

Although Vanderslice, Chick and Lynds were holders of the second mortgage notes they controlled plaintiff and its property, not as mortgagees in possession after condition broken, but as stockholders of the corporation. At no time prior to the fire was plaintiff out of the possession of the plant, either itself or by tenants. For two years it was in possession by its lessee the Sheffield Company and that tenancy was succeeded by the tenancy of the City Company under

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the lease executed in February, 1913. The latter company was in possession as such lessee at the time of the loss and so it appears that plaintiff was a mortgagor in possession of the building insured and the ground it occupied when the policy was issued and that no change in title or possession occurred between that date and the date of the fire.

This brings us to the defense "that a change other than by the death of the insured took place in the interest and title of the subject of insurance" because of the option plaintiff gave the City Company to purchase the property. That option was not exercised until after the fire and, as stated, the City Company on and prior to that date, was in possession only as lessee.

The change of interest referred to in the policy, in view of the rules which frown upon forfeitures and require that insurance policies shall be strictly construed against the insurers, means some change which would cause the loss by fire to fall on the buyer and does not relate to a grant by the insured of some right which does not change the party carrying the risk nor give the grantee more than a mere option to purchase the property. [Mackintosh v. Insurance Co., 89 Pac. 102, 150 Cal. 440; House v. Insurance Co., 121 N. W. (Ia.) 509.]

If the City Company after the fire had declined the option there can be no question that the loss would have fallen on plaintiff, the insured, and, therefore, plaintiff was carrying the risk and had not changed its interest in the property within the meaning of the proviso.

The defense that plaintiff had no title, interest or ownership in the property when the policy was issued, because of the sale under the Gate City Bank execution may be disposed of on the ground that under the facts disclosed in the record it appears that the interest acquired by the bank under the sheriff's deed was not a substantial interest or anything more than a mere cloud on the title which the bank was using

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to force a compromise out of Vanderslice, Chick and Lynds. The fact that the bank accepted a settlement of $200 for a quitclaim deed and consequent release of its demand for over $1700 at a time when plaintiff was compelled to remove all clouds from the title in order to convey the property to the City Company indicates the real nature and substance of that cloud.

The next defense is predicated on an alleged violation of the provision that the policy shall be void "if with the knowledge of the insured forclosure proceedings be commenced, or notice given of the sale of any property covered by this policy by virtue of any mortgage, or trust deed." In the former opinion in this case, written by JOHNSON, J., and delivered on May 1, 1916, it was held that, as this defense is based on the advertising and sale under the second deed of trust, instead of increasing the risk which defendant had agreed to assume this proceeding tended to lessen that risk, as the sale under the second deed of trust was for the purpose of improving plaintiff's interest in the property insured. That opinion reversed and remanded the case and the respondent applied to the supreme court for a writ of *certiorari* which writ was granted by said court, and in its opinion, delivered on the 19th day of February, 1917, the supreme court took a different view from that given by JOHNSON, J., supra, and held that the facts in this case make it come within the rule laid down in the case of Sprinfield Steam Laundry Co. v. Traders Ins. Co., 151 Mo. 90, for the reason that it makes no difference in this case whether the proceedings to foreclose said second mortgage tended to lessen the hazard or not. The supreme court held that antecedent reasons for making a contract cannot aid the court in construing this contract when it is clear and free from ambiguity. It held that the foreclosure clause here in question is a part of a solemn contract made between corporations, both of which are competent to make contracts; that there is no phase of equitable jurisdiction involved or

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invoked; that it is merely a question as to what that clause means and not to write into it terms or conditions which it does not contain, and that as it is undisputed that the property destroyed was being advertised for sale under a deed of trust when the fire occurred and that the remainder of the property was so sold pursuant to such advertisement, shortly after the fire, the clause under construction is clear and unambiguous, and that, regardless of whether the hazard was or was not increased the strict terms of the policy must be enforced.

And in view of such a ruling on the part of the supreme court it becomes necessary for us to hold in this case that that provision of the policy providing that "if with the knowledge of the insured foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy by virtue of any mortgage, or trust deed" has been violated and the policy voided.

However, in its brief filed here for our consideration, after the receipt by us of the mandate from the supreme court in this case, appellant contends that the clause in the rider attached to the policy providing that "notice of encumbrance waived" is a provision waiving that part of the body of the policy which provides that "if with the knowledge of the insured foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy by virtue of any mortgage, or trust deed," the policy shall be void.

This same contention was made by appellant in its original brief filed in this case before the delivery of the original opinion written by JOHNSON, J., as aforesaid. However, we have found from a reading of that opinion that nothing is said therein in reference to this point now being further urged by appellant. We are not greatly impressed with this point. The provision in the rider "notice of encumbrance waived" refers to encumbrances and not to a sale, or notice of a sale under a deed of trust or mortgage. That there

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is a vast distinction between the two is well recognized. We can well see how the defendant might have been willing for the premium it charged plaintiff to insure the property with the second mortgage on it and yet not willing to insure it in case of proceedings to foreclose such mortgage. In order to hold that the clause in the rider "notice of encumbrance waived" applied in this case to encumbrances on real estate we would have to say that said clause is equivalent to a statement that defendant assented to the encumbrances on the property or to any other encumbrance or encumbrances that might thereafter be placed thereon, but we do not believe said clause was intended in this case to apply to encumbrances on real estate. But even if it were so intended it could not be said that by said clause defendant consented to anything but encumbrances or that it assented to a continuance of the insurance in case of foreclosure proceedings. Such proceedings might have increased the hazard of the risk. Defendant might not have cared to continue the risk in case of foreclosure proceedings. Had it known of such proceedings it might have examined the circumstances and granted its assent to such proceedings without conditions, or it might have required an additional premium for any increase of the hazard of the risk that might have been present. It might have refused altogether to carry insurance longer and in that case foreclosure might have been delayed or the policy surrendered and insurance procured elsewhere. In other words, defendant would be in a position to act on such matters as it saw fit.

It seems to us that it is apparent that the clause in the rider "notice of encumbrance waived" had no reference to the clause in the body of the policy providing that the policy should be void if foreclosure proceedings be commenced, or notice of sale given, under a mortgage or deed of trust.

But appellant claims that when construing the language of insurance policies effect must be given to every clause in the policy, and as there is no requirement in the policy that the assured shall give notice

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of any encumbrance, or any provision that the policy shall be void in case the insured property, at the time the policy was written, was subject to an encumbrance of a mortgage or deed of trust, or that it should be void if such encumbrance be thereafter placed thereon without the consent of or notice to the insured, and there being no mortgage clause in the policy, that we cannot give any effect to the language of the clause in the rider "notice of encumbrance waived" unless we hold that it is related to the matter of foreclosure.

The policy is a standard form policy and is drawn so as to cover both real and personal property. However, the subject of the insurance in this case was real estate, but we find in the policy a provision as follows: "If the subject of insurance be personal and be or become encumbered by chattel mortgage . . . the policy shall be void." By a careful reading of the rider we find that while there are some provisions in it that were necessary to make the contract complete, in view of the surrounding conditions, still there are provisions in it that might not have been intended to apply to any such condition, in that it provides, among other things, for a gasoline stove permit, also privilege was granted to keep articles pertaining to other business, and to work over time, and to work at all hours. (The plant was not in operation.) So that we are compelled to conclude that the rider, as well as the policy, was originally drawn in very general terms and to cover both personal and real estate, and that the clause in the rider providing "notice of encumbrance waived" refers to the waiving of notice of any chattel mortgage on any personal property as provided in the body of the policy.

Appellant further urges the point that as defendant is insisting that the policy has been forfeited and has not returned the premium paid, or that portion of the premium which was unearned when the fire occurred, that it has waived the right to make such insistence.

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By the terms of the policy plaintiff was entitled to the unearned premium only upon the surrender of the policy. What plaintiff would have been entitled to in the event of cancellation would be as a rebate or come-back before defendant by cancellation was relieved of a part of the risk it had incurred for the consideration. It would not be so relieved unless it should, upon the surrender of the policy, as the contract provides, return the unearned premium. But that condition has not arisen, as plaintiff is insisting that the policy is still in force and is not offering to surrender the policy. As was stated in Senor and Muntz v. Ins. Co., 181 Mo. l. c. 113-114:

"There is a provision in this policy which provides that if the policy is cancelled or becomes void, the premium having been actually paid, the unearned portion shall be returned on *surrender* of the policy, the company retaining the customary short rate. It is incidentally urged that the defendant is in no position to resist the recovery of plaintiff Senor, and, at the same time, retain the premium under this provision of the policy.

It will be observed that the condition of the policy is that the unearned portion shall be returned upon the surrender of the policy. From the nature of this contest, it falls far short of indicating any surrender of the policy; but the reverse, an earnest effort to enforce it. Hence, the conditions have not yet arisen which would require the defendant to make the return of the unearned premium, as provided in the contract of insurance."

From what we have said there is nothing in the "new" points briefed by appellant since this case came back to us from the supreme court. So far as appellant's rights are concerned, they were fully and finally determined by the opinion of the supreme court. And in its mandate that court has adjudged "that the record in said cause be remanded to said court of appeals for further proceedings *not inconsistent* with this

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opinion." We cannot write this opinion other than the way we have written it without making it inconsistent with the opinion of the supreme court.

The judgment is affirmed. All concur.

KANSAS CITY REGAL AUTO COMPANY, Respondent, v. OLD COLONY INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, May 21, 1917.

1. **INSURANCE, THEFT: Automobiles: Value.** When an automobile is stolen from its owner, who has it insured against theft, and the car is located and recovered in another State and city by the Insurance Company, the Insurance Company's obligation does not end there, for they must return it to the owner with indemnity for damages to it, or pay the face value of the Insurance policy. A mere offer by the Insurance Company to turn the car in another State over to the plaintiff there and in addition to pay all damages by reason of theft is not a sufficient compliance with its Insurance policy, in order to defeat a recovery of the face value of the policy.
2. ———: **Evidence: Waiver.** In order for an Insurance Company to show a waiver, by an owner of an automobile of its return to him so as to defeat a recovery for the face value upon a theft Insurance policy, it must do so by clear and distinct evidence that such a waiver was made.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas,* Judge.

AFFIRMED.

George Kingsley for appellant.

Lathrop, Morrow, Fox & Moore for respondent.

BLAND, J.—This is a suit upon a policy for theft insurance written by the defendant upon an automobile owned by plaintiff.

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The facts concerning the theft of the car in question may be gleaned from a reading of the case of Kansas City Regal Auto Company v. Old Colony Insurance Company, 187 Mo. App. 514. This case is the same as that one. In the former case the judgment was reversed and the cause remanded and on another trial plaintiff again recovered and defendant appealed, but the matters submitted to us in this appeal are entirely different from those decided by the former appeal.

It appears from the evidence that the defendant located the stolen car at Ottawa, Illinois, and there brought a proceeding to recover possession of it, and after having so recovered it took it to Peoria, Ill., where it was stored.

Appellant claims as this type of insurance is indemnity insurance, that it was only required to make plaintiff whole in case of loss under the policy rather than pay the face of the policy, and that as it had recovered the car plaintiff was under the obligation to receive back the car upon the payment of defendant of all damages caused by reason of the theft. We believe that this contention of appellant's to be a correct one, but we find nothing in the record to show that the defendant ever returned the automobile to Kansas City where it was stolen and offered it to the plaintiff, together with all damages plaintiff sustained by reason of the theft.

We do not think that appellant discharged its obligation by notifying plaintiff that the automobile was in a garage at Peoria, Illinois, and offering to turn over the car to plaintiff there and, in addition, to pay all damages by reason of the theft. Plaintiff in Kansas City had no way of knowing what was the damages to the car stored in Peoria, Illinois. Nor do we believe it should have been required to settle the damages without knowing what liens had been created against the car since the theft, and with no certain information of what would be the exact cost of returning the car to Kansas City, to say nothing of the

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value of the time that plaintiff would have to devote to the matter of returning the car. In other words, if plaintiff were required to settle with defendant under the circumstances with the car at Peoria, Illinois, it would have been forced to settle in the dark. Plaintiff's insurance was one of complete indemnity and to force the situation on plaintiff demanded by defendant would not be giving the former its full right under the policy, consequently, we do not believe that plaintiff was fully indemnified until the car was returned to Kansas City by defendant. We do not mean that it should have been returned to the exact spot from which it was stolen, but it should have been brought to a place in Kansas City where plaintiff could have conveniently received it. There is some evidence tending to show that plaintiff waived the return of the car to Kansas City, but we do not regard this evidence sufficient as a matter of law to show a waiver, and as the jury found in favor of plaintiff, its finding on this issue is binding upon us.

The evidence adduced by defendant to show waiver was to the effect that defendant's agent went to plaintiff's attorney in Kansas City, Missouri, and offered to return the car and pay any damage to plaintiff that was occasioned by the theft, and plaintiff's attorney said that he did not want the car but wanted the money. The testimony on this point, however, shows that plaintiff's attorney did not refuse to accept the car in case defendant refused to pay the money. We think this is clearly shown by the following question and answer:

"Q. Did he say he would not accept the car, did he say that he did not want the car? A. I think, yes, that they could not accept the car."

This testimony certainly does not show definitely that plaintiff waived the right to have the car returned to Kansas City. In fact, the testimony on this point is so indefinite that we seriously doubt as to whether the matter should not have been taken away from the

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jury entirely. So far as the evidence shows, the car was never taken away from Peoria, Illinois and as it is our opinion that plaintiff was not fully indemnified until the car was returned to Kansas City and all damages caused to plaintiff by reason of its theft paid by defendant, plaintiff was clearly entitled to recover the value of the car.

The judgment is affirmed. All concur.

LEWIS MIDDLETON, Appellant, v. ST. JOSEPH RAILWAY, LIGHT, HEAT & POWER COMPANY, Respondent.

Kansas City Court of Appeals, May 21, 1917.

1. **NEGLIGENCE: Street Railways: Sudden Jerk of Car.** The plaintiff, while in the act of alighting from the defendant's street car, was thrown therefrom by a sudden jerk of the car and was injured. He was standing on the running board of the street car with his right foot suspended over the street, but not holding to the car with his hands, and just as his right foot was about to touch the ground the car jerked forward, so that his right foot, touching ground, acted as a pivot, causing him to spin around and fall backward with his head in the direction the car was going striking the pavement on his back and side. *Held*, that the cases of Scroggens v. Railway, 138 Mo. App. 215 and Daniels v. Railway, 177 Mo. App. 215, in which is set out the doctrine relating to falls from a street car against the natural law of force and gravity, does not apply in this case. The appellate courts have carefully refrained from extending the rule in these two cases.

2. ———: ———: ———. There is no arbitrary doctrine that can be laid down by appellate court stating that a human body may be projected in any given direction, when the court is not in a position to know of the intensity or suddenness of the jerk of the car, or of the quality of the other forces that were brought into play at the time.

Appeal from Buchanan Circuit Court.—*Hon. Charles H. Mayer*, Judge.

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REVERSED AND REMANDED.

Mytton & Parkinson for appellant.

Robert A. Brown for respondent.

BLAND, J.—On September 6, 1916, plaintiff was a passenger on one of defendant's north bound cars, it being an open car with the running board running lengthwise on the outside of the seats. Plaintiff in the act of alighting from the car was standing on the outside running board facing in the direction the car was going. The car had stopped for the purpose of taking on and letting off passengers.

From plaintiff's testimony we gather that he was injured as follows: He was standing on the running board of the stationary car, but not holding to the car with his hands, with his right foot suspended over the street preparatory to his getting off. Just as his right foot was about to touch the ground, but prior to its so doing, the car jerked forward, unbalancing him so that his right foot immediately struck the pavement, his left foot remaining on the running board. His right foot on the ground acting as a pivot, the forward motion of the car tending to carry his body forward, turned him around in a semi-circle and caused him to fall backward with his head in the direction the car was going, striking the pavement on his back and right side. The court sustained a demurrer to the evidence on the ground that the way in which plaintiff claimed he was injured was contrary to physical or natural laws.

In asking that the judgment of the lower court be affirmed respondent cites the cases of Scroggins v. Railway, 138 Mo. App. 215, and Daniels v. Railway, 177 Mo. App. 280.

In the Scroggins case a negro woman was proceeding down the step of a stationary car and was in the act of stepping from the last step to the street but not holding to the car, when the car started forward sud-

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denly throwing her on the pavement lengthwise of the car. She claimed that her head fell in the direction the car was going. In the opinion in that case it is stated that the evidence was that there were no counteracting forces sufficient to overcome the natural tendency of her body to fall with her head to the rear of the car and her feet toward the front, and this court refused plaintiff the right to recover for the reason that in claiming that she fell with her head toward the front of the car she was contending for something against natural laws. In the case of Daniels v. Railway, supra, plaintiff had boarded a car and had gotten upon the step and was reaching for the handhold, but before he got hold of it the car suddenly started forward, throwing him lengthwise of the car on the street. Plaintiff claimed that he fell onto the street with his head in the direction the car was going. In the Daniels case the court likewise said that there were no counteracting forces sufficient to overcome the natural tendency of Daniel's body to fall with his feet in the direction the car was going and his head in the opposite direction, and on the authority of the Scroggins case, supra, reversed the judgment.

We do not believe the facts in this case are similar to the ones in the Scroggins and Daniels cases. We see nothing contrary to physical or natural laws in plaintiff's story to the effect that his right foot was suspended over the street and the jerk of the car caused it to hit the street and unbalance him while the car carried him forward, causing his right foot to act as a pivot upon which he was turned around, falling on his right side and back toward the direction of the forward movement of the car.

There were a number of counteracting or interacting forces playing on plaintiff's body aside from the forward movement of the car toward the north. There was the force of the motion toward the east given to his body in his attempt to alight; there was the tendency of his entire body to go forward; there was

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the action of gravitation that tended to cause his right foot to remain stationary on the ground instead of moving with the car. It is the tendency of the feet to move with the car when the body tends to remain stationary by the force of gravitation that ordinarily would cause a body were it inanimate to fall with its upper part in the opposite direction to the forward movement. Then there is the all powerful but all modifying force of the involuntary action of one in attempting to regain his equilibrium, besides the many other peculiarities of plaintiff's position, all of these might combine to influence the direction in which plaintiff's body would naturally be projected.

We do not believe an expert in physics could ordinarily tell in what direction an inanimate mass might be projected as the result of a number of interacting forces being applied to it, much less as to what direction a live human body might be so projected. It is a known fact that a human being impelled by the strongest instinct known, "that of self-preservation" will involuntarily, through processes of reflex action, before he has time even for thought, attempt to counteract a force which if permitted to take its course would result in bodily harm to him.

Common experience has shown that it is not practicable to apply the laws of physics, in reference to inanimate objects, to a live, human being. For instance, one may be walking down an icy street and his feet slip; quite often he is able to regain his equilibrium although the center of gravity of his body may get without its base, that is, not within the space between his feet, while if an inanimate object be so place in the same position and the same thing would happen to it, its equilibrium would not be regained, but it would fall on account of the fact that muscular action would not be applied to it. On a football field a player is observed standing or running when one of his antagonists applies a great amount of force to the player's body, intending to upset the player, but the latter retains his feet; one often marvels that

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the player is able to maintain his equilibrium. But if he be unable to retain his feet, he is often able to influence the direction in which his body will be projected although he may not absolutely control it. If two men were to be placed upon the platform of a street car, one of whom were dead and by reason thereof had become an inanimate body, and the car having been stationary was suddenly propelled forward, the dead man, by reason of the fact that the center of gravity is in his body so far from the ground, would immediately fall with his head toward the rear of the car and his feet toward the front, while, unless the jerk was too great, the live man would regain his feet through muscular action although he had nothing to catch hold of.

In an ordinary trial there is no evidence as to the intensity of the jerk of the car or the amount of resistance the passenger is able to involuntarily give to counteract the force of the jerk. In most any case that we might imagine there might be a number of interacting forces aplied to the body of a passenger and no one could well know the entire quality of such forces. Force is a peculiar thing, as is said by a good authority, "force is ordinarily defined by its intensity or amount, its direction, its power of application and the time at which it exists." [Vol. III, p. 2318, Cent. Dict. and Cyc.] Consequently it is hard to imagine any case where we can lay down as an arbitrary proposition that a human body may be projected in any given direction when we are not in a position to know of the intensity or suddenness of the jerk of the car, or of the quality of the other forces that were brought into play at the time.

In the case at bar the evidence was that the car gave "a sudden jerk forward." But even from this testimony we are unable to judge as to the exact intensity of such forward jerk of the car, nor are we able to tell what powers of resistance were offered by plaintiff against the force of the sudden jerk of the car forward; nor are we able to tell what effect

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upon the situation was had by reason of the fact that plaintiff's right foot struck the street first and his left foot and body remained on the car, in the matter as to what direction his body would fall. However, the manner in which his body was projected and the way in which he fell appear to us to be very reasonable, but as was stated in Showen v. Railway, 164 Mo. App. l. c. 52, it is not for the court "to weigh the evidence in order to balance the probabilities or possibilities. Wherever the inference is permissible that the injury occurred in the manner claimed by the plaintiff, an issue of fact is made for the jury to determine."

The appellate court that will indulge in dogmatic conclusions and pronounce that to be impossible which not only might be possible but is well within the scope of reasonable result when forces are brought into play, and attempts in all cases to apply natural laws as applied to inanimate objects to live human beings, is deciding a case arbitrarily and without intelligent consideration. These cases ordinarily present problems of physics beyond the pale of judicial cognizance. As was stated in a recent case by this court:

"Strange things sometimes happen and apparently inconsistent with natural laws, but we should be slow to conclude that because of their apparent impossibility, they did not occur." Holland v. Railway, 157 Mo. App. l. c. 481.

We are not unmindful that this class of cases is bottomed on the negligent sudden *jerk* of the car and for this reason where it clearly appears that no counteracting or interacting force (including the force of muscular action) were, or could have been brought into play, then natural laws as applied to inanimate objects may be invoked as a matter of law. But that the doctrine of the Scroggins and Daniels cases is not to be extended is held in Allen v. Railway, 188 Mo. App. l. c. 200, where it is said: "but we have carefully refrained from extending this rule."

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There is nothing in the record to show that the trial judge thought that the manner in which plaintiff claimed he fell was against natural law, but the former was unable to distinguish this case from the Scroggins and Daniels cases. However, he could not have done this without extending the doctrine of these two cases and this, we think, he should not have done.

The judgment is reversed and the cause remanded. All concur.

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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1916.

FRITZ ALBERS et al., Appellants, v. ACME PAVING & CRUSHER CO., et al., Respondents.

Kansas City Court of Appeals, January 29, 1917.

1. **TAX BILLS: Suit in Equity to Cancel: Grading Boulevard: Authorization by the City.** The grade of Swope Parkway Boulevard in Kansas City had been fixed and established. The park board passed a resolution that a certain part of said boulevard be graded to its full width and to the established grade. The City Council then passed an ordinance authorizing the work to be done "according to plans and specifications" referred to as being then on file when there were none. If said ordinance had been the only legislative enactment of the city authorizing the work to be done, there might be room for the claim that the council had authorized something to be done the nature and extent of which was unknown as no specifications had been adopted. But, after the park board had adopted plans and specifications, and after it had prepared a form of contract, had advertised for bids and had let the tentative contract, the city, by ordinance, authorized the grading to be done as resolved by the board and in accordance with the plans and specifications on file, and also ratified the tentative contract, which made the same final and binding under Sec. 31, Art. 13 of the Charter. Hence there was legislative authorization for the grading and for its being done according to specifications, even if the first ordinance referring to plans and specifications was passed when none were on file.

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2. ———: ———: ———: ———: **Committing City to Improvement.** The passage of an ordinance by Kansas City authorizing the grading of a boulevard and referring to plans and specifications as being on file when there were none in existence, did not irrevocably commit the city to the improvement regardless of the cost since the whole matter was in the council's hands and could be determined when it came to consider whether it would finally authorize the work and ratify the contract made by the board.

3. ———: ———: ———: ———: **Ordinance: Effect of.** The passage of an ordinance by Kansas City authorizing the grading of a boulevard and referring to plans and specifications as being on file when there were none in existence was not an absolute nullity, but with the plat of the city engineer, was sufficient to afford a basis on which to institute proceedings in the circuit court to ascertain damages. Hence the said court was not without jurisdiction to entertain and carry on said proceeding.

4. ———: ———: ———: ———: **Ordinance: Surplusage.** Where the provisions in the charter of Kansas City, pointing out the steps necessary to be taken in grading a street, were not violated in grading a parkway, and the fact that no plans or specifications were adopted prior to the adoption of the first ordinance of the city council in relation to the work, referring to such plans and specificatins as on file is not shown to have resulted in any detriment or injustice to the city, the public, or the parties involved, the mere recitation of such first ordinance that the plans and specifications were on file may be treated as surplusage.

5. ———: ———: **Roads and Highways: Establishment: Defects Cured by Deed from Owners.** A right of way deed signed by a large number of landowners, conveying to a county the right of way necessary to make a particular boulevard 150 feet in width, as to all lands whose owners joined therein, cured all defects in a prior proceeding to establish the highway.

6. ———: ———: **Dedication: Subsequent Acquisition of Title.** If deeds were sufficient to vest title to a graveyard in a land company which had dedicated streets by platting an addition, such title, though acquired subsequent to the platting of the addition, would inure to the benefit of the public by reason of the dedication by plat.

7. ———: ———: ———: **Dedication of Land: Intention: Vesting of Title.** If landowners intended to and did consent to an appropriation of a strip of land for a boulevard, it was not necessary for the prescriptive term to elapse in order to vest title in the public.

8. ———: ———: ———: ———: ———: **Work on Private Property: Evidence.** In a suit to cancel tax bills on the ground that the boulevard improved was over private property, evidence *held* not to warrant cancellation and cause a company which graded

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the boulevard to lose payment for work done in good faith, and with no notice that there could be even a claim that grading was not on public property.

9. ———: ———: ———: ———: ———. Where owners of land executed a right of way deed for a parkway to the county three days before they got title to the land, but more than ten years elapsed after they obtained title and neither they nor any other person holding the property at any time made any claim to the strip they sought to dedicate by joining in the right of way deed which was open to and used by the public, such conduct on their part evinced an intention to dedicate the land after they had title; and if the right of way deed was not a valid statutory dedication, it was good as a dedication at common law.

10. ———: ———: ———: ———: **Corporations: Conveyance: Want of Seal.** If a realty company a corporation has a seal and does not affix it to a deed relinquishing right of way for a boulevard, doubtless the failure to attach the seal makes the deed insufficient as a conveyance of the company's legal title. But since the dedication attempted by the company has been accepted by the public, it is valid as a common-law dedication if not good otherwise.

11. ———: ———: ———: **Church Trustees: Authority: Presumption.** Church trustees, in conveying land to a county for a parkway, are presumed to have acted by authority from the church for whose benefit and under whose direction they held the property, and such trustees can properly dedicate property to a public use not inconsistent with the trust as to consent to an easement on the east side of church property to create a beautiful boulevard in front of the church.

Appeal from Jackson Circuit Court.—*Hon. Joseph A. Guthrie,* Judge.

AFFIRMED.

House, Manard & Johnson for appellants.

Griffin & Orr for respondents.

TRIMBLE, J.—Swope Parkway, hereinafter referred to, is a boulevard in Kansas City, Missouri, 150 feet wide running from Forty-seventh street to the entrance of Swope Park. The proceedings by which said boulevard was established, or sought to be established, were taken in 1903. It was laid out in that

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year and ever since has been open to and used by the public as a highway of that width leading to Swope Park. At that time, that portion of said boulevard running from the west line of the southeast quarter of section 27, township 49, range 33, southeastwardly and south to Swope Park entrance was not in the city limits. Afterward, and in 1909, the city limits were extended so as to take said portion, and the territory through which it ran, into said city. In 1911, the city established the grade of said boulevard and began proceedings to have the above-mentioned portion thereof brought to the established grade, the cost of such grading to be paid by special tax bills issued against the property fronting on both sides of said portion of said boulevard. These proceedings resulted in the acceptance of the Acme Paving and Crusher Company's bid for the doing of the work and a contract with said company therefor, and in the issuance of special tax bills to the amount of $60,755.63.

This action, brought June 28, 1913, is a suit in equity by certain owners of property, the tax bills on which amount in the aggregate to $6089.56, to cancel said tax bills. After a trial and full hearing, the chancellor dismissed plaintiff's bill, and they have appealed.

Respondents motion to affirm the judgment because the bill of exceptions is not properly signed is clearly without merit. The case was tried before Hon. Joseph A. Guthrie, at that time the regular judge of Division No. 1 of the Jackson Circuit Court. He resigned before the bill of exceptions was signed, and Judge Buckner was appointed by the Governor as his successor. The bill was signed by Judge Buckner as Judge of said court, and following his signature appears that of Guthrie as former judge before whom the case was tried. Judge Buckner also made the order under which the bill was filed. The signing of Judge Buckner properly authenticated the bill. [Sec. 2032, R. S. 1909.] The signature of the judge who tried the case performed no function except to

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show Judge Buckner that the bill was correct. Judge Guthrie's signature could in no way invalidate the signing done by Judge Buckner. The case of Ranney v. Hammond Packing Co., 132 Mo. App. 324, is not applicable by reason of the fact that, in the case at bar, the bill was signed and ordered filed by the judge who alone had power so to do. There is no question as to the correctness of the bill which Judge Buckner signed, since it contains a stipulation, signed by all the counsel, that it is correct. Hence there is not in the point made by the motion as much as was involved in a similar motion made in Johnston v. Ragan, 265 Mo. 420.

The objection to the validity of the bills which we shall first consider is that the proceedings by which the work was authorized and the tax bills were issued, are defective so as to render the bills null and void. This objection has two features, one relating to the proceedings by the city to authorize the work and the other to the proceedings in the circuit court to ascertain the damages caused by the grading. However, they are so closely related that the full force of the objection is not seen or understood unless they are considered together. Before these two features are specified, it will be better to set forth the steps that were taken, as in this way the strength or weakness of the objection based on said two features will more clearly appear.

On June 12, 1911, the Board of Park Commissioners, by a resolution, fixed the grade of Swope Parkway and recommended to the Common Council the passage of an ordinance establishing said grade in accordance with the resolution. The council, by ordinance approved June 14, 1911, established said grade in accordance with the resolution and recommendation of said Park Board. On July 10, 1911, the said Park Board, pursuant to section 31, article 13, Kansas City charter, 1909, adopted a resolution numbered 10,367, that the above-mentioned portion of Swope Parkway (describing it), be graded to the full width

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thereof and to the established grade of the same. "Said improvement to conform in all respects to plans and specifications for said work *to be hereafter adopted* and perfected by this Board." Said resolution further specified that payment of the cost be made in special tax bills assessed against each lot or tract of land, within certain limits therein specified, and changeable therewith, on both sides of said Parkway. Said resolution further recommended to the council to provide, by ordinance, for the doing of said work and that payment for the whole thereof be made by special tax bills and that said council, by ordinance, order said work to be done. Thereafter, by ordinance No. 9447 approved August 16, 1911, said council ratified the action of the Board of Park Commissioners, and ordered that said portion of Swope Parkway be graded to the full width thereof and to the established grade, specifying therein that "the work herein authorized shall be of the nature described and specified in, and shall be done *in accordance with plans and specifications adopted, perfected and approved by the Board of Park Commissioners, which said plans and specifications are now on file in the office of said Board,* said improvement is hereby provided for and authorized." Said ordinance further provided that the cost should be paid in special tax bills issued against the property chargeable therewith, and further ordered that proceedings be had to ascertain and determine the damages to private property on account of such grading. The ordinance then described the benefit district and the limits within which the property should be assessed to pay the remuneration or damages to be allowed. The city engineer prepared a plat containing a correct description of the several lots in the benefit limits, and furnished the same to the Mayor as required by section 3, article 7 of the charter. Proceedings were then instituted in the circuit court of Jackson county, Missouri, on October 28, 1911, to ascertain the benefits and damages, as required by article 7 of said charter. These proceedings resulted in a verdict,

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returned January 30, 1912, finding that the actual damage to each piece of property did not exceed the peculiar benefits accruing thereto by reason of the proposed grading and, therefore, no damages were allowed to any piece. No motion of any nature questioning the validity of this verdict was filed by anyone. Nothing whatever was done in said cause until the May term, May 13, 1912, when the city filed a motion to confirm the verdict and to enter judgment in conformity therewith, which motion was sustained by the court, and judgment was entered approving and confirming the verdict.

In the meantime, that is to say, on February 5, 1912, after the verdict had been returned but before the judgment of confirmation was entered, the Board of Park Commissioners, by resolution No. 10808, adopted plans and specifications for the grading of said portion of Swope Parkway, and approved the form of contract for said work and directed that advertisement be made for bids thereon. This was done, and bids for doing the work in accordance with such plans and specifications were received, and on February 19, 1912, the bid of the Acme Paving & Crusher Company was accepted and a contract was awarded it for the doing of such work. On February 26, 1912, said Park Board, by resolution, approved the contract and bond for the work, and recommended to the common council an ordinance providing for and authorizing the work. On March 5, 1912, the common council passed said ordinance, being Ordinance No. 11705, directing that the aforesaid portion of Swope Parkway be graded to the full width thereof and to the established grade of the same, the work and improvement to be of the nature described and specified in, and to be done in accordance with, the plans and specifications adopted by the Park Board February 5, 1912, and on file in the office of said Board, and in accordance with the contract and specifications therefor between the Board of Park Commissioners and the Acme Paving and Crusher Company and its surety, entered into on Feb-

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ruary 19, 1912. Said ordinance ratified and confirmed the contract and made it and the specifications a part of the ordinance, and directed that payment of the cost of all the work be made in special tax bills assessed upon each lot or parcel of ground, within certain specified limits, chargeable therewith, on both sides of the Parkway, all in accordance with section 3, article 8 of the charter. Thereupon the Acme Paving and Crusher Company began the work, and while engaged therein, a notice signed by three of the plaintiffs, was, on May 22, 1912, served upon it and the Park Board stating that in their opinion the tax bills to be issued would not be valid for the reason that the proceedings were not in accordance with the city charter. The grading was done in strict accord with the specifications and when it was finished, the Park Board accepted the work and declared the cost thereof to be $60,755.63 and, by resolution, certified to the Board of Public Works an apportionment of the cost of the work and the issuance of the special tax bills. On January 30, 1913, the Board of Public Works approved the acceptance of said work and passed a resolution requiring the city assessor to return an assessment list against the property affected by the work for the purpose of charging the same with the cost of said grading. This was done and on January 31, 1913, the Board of Public Works approved the apportionment and assessed the tax bills to the aggregate amount of $60,755.63, against the property affected, and ordered the apportionment and assessment to be certified to the city treasurer and the tax bills to be made, certified, registered and delivered to the parties in whose favor they were made out. Thereafter, and on the same day, the tax bills were issued to the Acme Paving and Crusher Company, and on February 1, 1913, were delivered to that company and the Fidelity Trust company which companies accepted and receipted for them.

Having set forth in general outline the steps taken, we can now state the two features of plaintiffs'

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objection hereinabove mentioned. They are: 1. That no plans and specifications were adopted by the Park Board prior to the passage of Ordinance No. 9447. 2. That no judgment was rendered on the verdict assessing no damages, returned January 30, 1912, until the May term following, at which time, plaintiffs say, the court had no authority to render judgment therein and that any judgment then rendered was a nullity.

It seems to us that the first matter to be determined is, when does the city charter require the plans and specifications to be filed? The Supreme Court in Waddell Inv. Co. v. Hall, 255 Mo. 693, say that in grading matters "the specifications are to follow the passage of the ordinance and not precede it." The charter does not *expressly* specify any point in the proceedings at which they must be adopted. Section 31, article 13, charter 1909, page 429, says the Park Board shall have power to cause ny road, parkway or boulevard to be graded in such manner and at such times as the Board may determine, provided, that if said Board shall, by resolution, determine that any such work shall be done and be paid for by special tax bills, the Common Council shall have power by ordinance to ratify and confirm the action of such Board and authorize the work to be done, in which case, and when so ratified, the Board of Public Works shall apportion the cost. Said section also provides that the Park Board shall let the contract to the lowest and best bidder and the work shall be done under the supervision of the Park Board, but such contract, before it becomes effective shall be ratified and confirmed by an ordinance of the Common Council. Now, in this case, the grade of the boulevard had been fixed by the Park Board and established by the council. The Park Board then passed a resolution, No. 10,367, that a certain part of said boulevard be graded to its full width and to the established grade. The council then passed Ordinance No. 9447. It is true it refers to plans and specifications as being on file when there

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were none. And if said ordinance was the only legislative enactment of the council authorizing the work to be done there might be room for the claim that the council had authorized something to be done the nature and extent of which was unknown as no specifications had been adopted. But Ordinance No. 9447 is not the only ordinance authorizing the work. On March 5, 1912, *after* the Park Board had adopted plans and specifications, and after it had prepared a form of contract, had advertised for bids and had let the tentative contract, the city council by Ordinance No. 11705 authorized the grading to be done as resolved by said Board and in accordance with the plans and specifications adopted by and on file with said Board, and also ratified the tentative contract entered into, which ratification, under section 31, article 13 of the charter, made the contract final and binding. So that there was legislative authorization for the grading and for its being done according to specifications, even if Ordinance No. 9447 was passed at a time when no specifications were in existence. But it is claimed that the proceeding in the circuit court to ascertain damages was instituted before the passage of Ordinance No. 11705 and was therefore premature and a nullity. To understand this feature of the case it should be stated that said section 31 of article 13 of the charter also provides (charter p. 431), that before any road, parkway or boulevard shall be graded, if the property owners to be disturbed or damaged have not waived compensation therefor, proceedings shall be had for the ascertainment of damages and benefits as provided by section 2 and following, of article 7 of the charter. By section 2 and following, of said article 7, it is provided that the ordinance which authorizes the grading shall prescribe and determine the limits within which private property is deemed benefited by the proposed grading. [Charter, p. 293.] (This was done in both ordinance 9447 and 11705 and the district was the same in each as were also the other terms.) Section 3 of said article 7 (charter, p. 293) requires

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the city engineer within thirty days, to furnish the Mayor with a plat containing a correct description of the several lots or parcels of private property in the benefit limits prescribed, but says that a failure to furnish the plat within the specified time shall not invalidate the proceedings. (This was made out and filed with the Mayor after the passage of ordinance No. 9447.) Then follow sections in article 7 providng for the institution of proceedings in the circuit court to ascertain and determine damages, which proceedings are instituted by filing in said court a copy of the ordinance and plat. [Charter, p. 295.] Plaintiff's view is that, since there were no specifications in existence at the time ordinance No. 9447 was passed, and hence none were approved or in existence when the ordinance and plat were filed in the circuit court, therefore there was no authority for the proceeding.

But said section 31 of article 13 provides (charter, p. 430), in dealing with the ratification of the contract by the Common Council, that it shall be ratified, approved and confirmed "in the same manner as contracts for *work done under the supervision of the Board of Public Works* are required to be ratified, approved and confirmed." Now, the ninth paragraph of section 3, article 8 (charter, p. 313), in reference to the ratification of contracts for work done under the supervision of the Board of Public Works, says: "The ordinances ratifying, approving and confirming the contract . . . shall also provide for and authorize the improvement, and *shall state the nature of the improvement* and this *may* be done *by a reference to the plans and specifications* therefor, and such ordinance shall state how the cost thereof shall be paid." This is exactly what ordinance No. 11705 did. And this is the only place, so far as we have been able to find, where plans and specifications are *specifically* referred to in providing for any ordinance to be passed by the council ratifying the action of the Park Board. In paragraph 6 of section 3, article 8, which says it relates to the improvement of public highways

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of every character (charter, p. 310), by the Board of Public Works, it is provided that the Board shall adopt plans and specifications for the proposed improvement (charter, p. 312), and in paragraph 7 of said article 8 (charter p. 313) it is provided that *after* the adoption of plans and specifications, the Board shall advertise for bids. Thus the time when plans and specifications are imperatively required seems to be before bids are advertised for. The charter certainly does not *expressly* say anything about specifications for the grading, in providing either for the Park Board's first resolution to do the work or for the council's legislative authority therefor. Specifications are required before the bids are advertised and then, of course, they are necessary, and they must be in existence and adopted and on file in order that a valid tentative contract can be made, and before the council can make the contract final and binding by its ratifying ordinance. So that the passage of ordinance No. 9447, with no specifications in existence, did not irrevocably commit the city to an improvement regardless of the cost since the whole matter was still in the council's hands and could be determined when it came to consider whether it would finally authorize the work and ratify the contract made by the Park Board. The council knew the width of the boulevard and the established grade thereof, and by said ordinance No. 9447, it authorized the boulevard to be graded to its full width and to the established grade in accordance with the recommendation of the Park Board. Said ordinance was not an absolute nullity but, with the plat of the city engineer, was sufficient to afford a basis on which to institute proceedings in the circuit court to ascertain damages. Hence the said court was not without jurisdiction to entertain and carry on said proceeding.

In this inquiry as to damages, the jury did not have to consider plans and specifications in order to know what the damages would be. The grade was established, the width of the boulevard was known, the ordinance called for the grading thereof to its full

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width and to the established grade. These matters, together with the engineer's plat of the property and the names of the owners, were all before the jury, and fully enabled it to say, after hearing the evidence, what the damages to the abutting property, by reason of the proposed improvement, would be.

In this connection it should be remarked that there is no evidence that plaintiff in case at bar filed any claim for damages in said proceeding. Section 10, article 7, of the charter provides that any person who fails to file a claim for damages shall be deemed to have waived the same. Nor have any of the plaintiffs asserted at any time that their property has been damaged by the grading.

The fact that the circuit court did not render judgment upon the verdict until the May term following has nothing to do with the validity of the bills. Section 13, article 7 (charter, p. 304), provides that should no claim for damages be filed at any time before the day set for hearing or *if the verdict shall declare that no damages will result* to private property from the proposed grading, the city may proceed to cause the grading to be done. The verdict being that there were no damages, the city was free to go ahead with the grading, and was not interested further in the proceedings to ascertain damages unless indeed the verdict should be set aside or annuled in some way. Nothing of this kind was done, and when the verdict was confirmed on May 13, 1912, the record recites that all persons and parties interested in said proceedings were present. No claim is made that the plaintiffs in the case at bar were not made parties to that proceeding and, as heretofore stated, nothing was ever done afterward by anyone in said proceeding except by the city to have the verdict confirmed.

In fine, the grading determined upon by the Park Board, and for the doing of which the tax bills were issued, received the legislative sanction of the council *after* plans and specifications were adopted, and said legislation also provided and directed that said work

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thus specified, should be done as resolved by the Board and should be paid therefor in the manner determined upon. The proceeding which resulted in a verdict assessing no benefits and no damages has never been disturbed, and there is no showing that any of the parties seeking to cancel said tax bills ever sought to disturb said result, or were even in a position where they could claim to be interested in the result. The provisions in the charter pointing out the steps necessary to be taken were not violated, and the fact that no plans or specifications were adopted prior to the adoption of the *first* ordinance in relation to the work is not shown to to have resulted in any detriment or injustice to the city, the public or the parties hereto, convinces us that the mere recitation in ordinance No. 9447, that the plans and specifications were on file, may be treated as surplusage, and that payment for the work should not be defeated by the cancellation of the bills upon the grounds thus far considered.

Another ground upon which the bills are attacked is that the proceedings by which Swope Parkway was established were defective and insufficent to vest the public with an easement in the right-of-way, and therefore, although the grading was done within the limits of the boulevard's width of 150 feet, as marked out and actually opened on the ground, yet such right-of-way, or at least portions thereof, is or are private property.

As stated, the steps by which Swope Parkway was created, opened and laid out, were taken in 1903. In 1886, long prior to the establishment of Swope Parkway, and before the territory, through which the hereinabove mentioned portion of said boulevard now runs, was taken into the city, Jackson county established a road, 80 feet wide, known as Cleveland avenue, the center line of which so far as concerns this case, ran from the southwest corner of the northeast quarter of the southeast quarter of said section 27 south to and on the center line of the east half of section 34, township 49, range 33 and on the center line of the east half of section 3, township 48, range 33, to the terminus of

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said avenue. The center line of that portion of Swope Parkway which was ordered graded runs from the west line of the southeast quarter of said section 27 in a general southeasterly direction through the west half of the southeast quarter of said section 27, and the west half of the northeast quarter of said section 34 and into the northwest quarter of the southeast quarter of said section 34, until it coincides with the east line of said last named quarter-quarter section at a point 650 feet south of the northeast corner of said last named quarter-quarter section, and then said center line runs due south on the center line of the southeast quarter of section 34 and on the center line of the northeast quarter of section 3, and on the center line of the southeast quarter of said section 3, to a point 146 feet north of the south line of the north half of the southeast quarter of said section 3, the terminus of said boulevard. A comparison of the center lines of the above-mentioned portions of Cleveland avenue and Swope Parkway will disclose that the center line of the latter runs into and coincides with the center line of the former at the point 650 feet south of the northeast corner of the northwest quarter of the southeast quarter of said section 34, and the two said center lines continue to coincide as they run on south to the terminus common to both highways. As Cleveland avenue was only 80 feet wide and Swope parkway 150 feet in width, the effect of the opening of the latter was to absorb an additional 35 foot strip of ground on each side of the limits of Cleveland avenue. Kansas City brought no proceeding to condemn or acquire a right-of-way for Swope Parkway, or for the portion thereof graded, and did nothing to acquire any jurisdiction thereover except to extend the city limits in 1909. Plaintiffs say that, in so doing, the city obtained jurisdiction over only such portions of said right-of-way as had become vested in the public. Their view is that the establishment of Swope Parkway rests on a judgment

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of the county court of Jackson county, made April 15, 1903, and that the same is null and void because the record of that proceding fails to show certain jurisdictional facts, namely, that the petition was signed by at least 12 freeholders of the municipal township, three of whom shall be of the immediate neighborhood, etc., as required by section 9414, Revised Statutes, 1899, and fails to show that notices were put up as required by section 9415 of said statutes of 1899. The only record in relation to the above-mentioned portion of Swope Parkway offered in evidence, aside from one noting the filing of a petition for the said highway, is the final judgment entered by the county court. It recites that Thomas H. Swope and others file petition and the court grants same, and establishes said highway 150 feet in width, being 75 feet on each side of the center line hereinbefore mentioned (describing it) "conditioned, however, that said petitioners secure a right of way for said route without any cost to the county." The record of the county court further directs that the Board of Park Commissioners be notified and requests that the city engineer assist in laying out said boulevard. There was evidence by an abstracter, who had searched the records, to the effect that this was all the record entries relating to said proceeding in the county court. It may be conceded that said record does not disclose the facts necessary to confer jurisdiction on the county court to establish said highway. And if that were all there was to vest the easement of the highway in the public, and if such vesting was not effected by anything except said judgment, it could well be said that no such highway was established. But in October, 1903, there was filed in the office of the county clerk of Jackson county a right-of-way deed signed by a very large number of landowners conveying to Jackson county the right of way necessary to make said boulevard 150 feet in width. Said conveyance cures all defects in the proceeding to establish said highway, that is, as to all lands whose owners joined therein. There is no showing that any land then owned by any of the plain-

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tiffs was taken without their consent, nor that the lands now owned by plaintiffs were derived by them from any one who did not consent, or who objected to such taking. In fact, it is not shown that anyone objected to such taking or has manifested in any way any objection to such taking. So far as the record shows, no person has ever asserted a claim of ownership over any portion of the land within the limits of said boulevard, nor do plaintiffs or anyone else make any such claim. The boulevard has been opened to the public and in use by it ever since 1903, and during all that time nothing has been done by anyone to manifest a claim of ownership over any portion of said right-of-way. Stated correctly, the real gist of plaintiff's contention is that as the judgment of the county court was not sufficient to foreclose the rights of the owners of land taken, only those owners' rights were foreclosed who joined in the right-of-way deed in a way sufficient to convey title, and that there are certain tracts of land within said boulevard limits whose owners either did not join in said right-of-way deed or who, if they did join, did not follow the formalities necessary to make a technical conveyance of the legal title or to constitute a dedication thereof; and, although none of the owners of these tracts have made, or now make, any claim to land within the boulevard limits, nevertheless, plaintiffs, in order to defeat the tax bills assessed against their own property as its proportion of the expense of improving said boulevard,will assert, for the owners of said tracts, the claim that said tracts are still private property.

These tracts will be considered in their order. They are: 1. A graveyard which, according to the map or blue print of the boulevard in the abstract, was located east of Cleveland avenue and in the northeast quarter of the northeast quarter of said section 3. This graveyard contains one-fourth of an acre, and seems to have been square in shape. If so, then it is 104.354 feet each way, and if, as plaintiffs claim, its western line coincided with the east line of Cleveland avenue,

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then in establishing Swope Parkway, a strip, 35 feet wide by 104,354 feet long, off the west side of the graveyard, was taken into said boulevard. The graveyard was not established by a conveyance of any kind. Its first appearance is merely by reference in a deed made in 1853 by William Adair and wife to one Adams conveying the northeast fractional quarter of said section 3 "excepting out of the piece one-fourth of an acre to include a graveyard now on said land." It does not seem to have been described by metes and bounds definitely located in any of the conveyances to Adams or to his successors in title. There is evidence that it never was fenced, though there is other evidence that at one time, years ago, it was fenced but that the fence had disappeared. At length, Joseph O. Thompson became the owner of said quarter section and on April 16, 1903, he conveyed a part of it to Collier et al., excepting the tract set aside for graveyard. Collier et al. signed the right-of-way deed relinquishing a strip of their land 35 feet wide on the east side of Cleveland avenue for the widening of Swope Parkway. In 1906 the Collier land was deeded to the Montopia Land Company and in this deed no mention is made of a graveyard but the deed recites that it is "subject to the rights of the public in the street and boulevard as now established."

The Montopia Land Company, in April, 1906, platted this land into "Mountain View Addition" and dedicated all streets shown thereon to public use. Swope Parkway, 150 feet wide, appears on this plat as the western boundary of "Mountain View Addition." On July 11, 1907, William Adair, who first excepted the tract for a graveyard, conveyed to H. C. Adair a tract described as "Beginning 1251.2 feet west and 664.8 feet south of the northeast corner of said section 3, township 47, range 33, thence south 104.35 feet, thence east 104.35 feet, thence north 104.35 feet, thence west 104.35 feet to the place of beginning, containing one-fourth of an acre." By mesne conveyances this tract was conveyed to Montopia Land Company by deed filed June 19, 1913. On June 13, 1907, two days after the

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above-mentioned conveyance from William Adair and wife to H. C. Adair, said William Adair and wife made a quit-claim deed to H. C. Adair to one-fourth of an acre in the northeast quarter of section 3 "heretofore reserved for a graveyard." On June 20, 1913 (eight days before the institution of this suit), H. C. Adair conveyed to Montopia Land Company "all that one-fourth acre of land once reserved for a private graveyard in the northeast fractional quarter of section 3, township 48, range 33, the same being the only land ever used or reserved for graveyard in said quarter section and it is hereby intended to grant and now is granted all land ever so reserved or used." If these deeds were sufficient to vest title to the graveyard in the Montopia Land Company, then such title, although acquired subsequent to the platting of Mountain View Addition, would inure to the benefit of the public by reason of such dedication by plat. [Kansas City Mill Co. v. Riley, 133 Mo. 574; Reid v. Board of Education, 73 Mo. 295; Longworth v. Sedevic, 165 Mo. 221.]

It is contended, however, that the deed of July 11, 1907, from William Adair did not convey any ground occupied by the boulevard, since, as shown by various deeds in evidence, the distance from the northeast corner of said section 3 to the west line of the east half of said quarter section (the latter being the center line of Swope Parkway and old Cleveland avenue), is 1326.7 feet, and the beginning point of the one-fourth acre described in said deed of July 11, is 1251.2 feet west of east line of said section 3, and, therefore, the west line of said one-fourth acre tract is 75.5 feet east of center line of said Swope Parkway. Said deed of July 11, therefore, does not affect any portion of the land inside the boundaries of said Parkway, and so plaintiffs say the title to a 35 foot strip the length of the graveyard was still left in William Adair on July 11. This is assuming, of course that the west line of the graveyard reserved and excepted by him in 1853 coincided with the east line of Cleveland avenue. But there was no definite location of the graveyard by

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metes and bounds, and may not this deed from William Adair, describing one fourth of an acre by metes and bounds, be regarded as a declaration of the precise location of the ground he had heretofore reserved? Being the one who made the reservation he would be presumed to know its location better than any one else. If, however, the correct location of said one-fourth acre made the west line thereof coincide with the east line of Cleveland avenue, still may not said William Adair's act, in making said deed of July 11, be regarded as a recognition on his part that the boulevard extended to a distance of 75 feet east of the center line of said quarter section? If so, then may not his act be regarded as a voluntary dedication *in pais* of the portion occupied by said boulevard? [Meiners v. City of St. Louis, 130 Mo. 284.] And if William Adair intended to and did consent to such appropriation of that strip of the land, then it is not necessary for the prescriptive term to elapse in order to vest title in the public. [McGrath v. City of Nevada, 188 Mo. 102.] It is true, two days later he made another deed to H. C. Adair to the graveyard "heretofore reserved" and recited therein that "the grantee herein is to hold one-fourth acre for the purpose of a graveyard." But this deed may be interpreted as evincing an attempt on his part to place a limitation on the tract he had already conveyed to H. C. Adair, i. e., that the graveyard then remaining should be held as such. Certain it is that neither he nor H. C. Adair nor anyone of the family or claiming under them have ever evinced the slightest objection to the widening of Cleveland avenue into the Parkway Boulevard. The evidence shows that this graveyard was a family burying ground of the Adairs; that there were five and possibly six graves on the tract. One witness says five and another says six. Three of the graves were surrounded by a brick inclosure eight or ten feet square and four or five feet high and the first above-mentioned witness says there were two graves immediately south of the inclosure and that there might have been a third outside of the inclosure but, if so, it

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also was immediately south thereof. Witness Tolliver, however, says there was the grave of a child named Moon in the northwest corner and further west than the brick inclosure. He testified that "as nearly as I can remember, it would be nearly in the street now." He said the Adair family, he judged, were buried forty feet from Cleveland avenue, it might not be that far, it might be farther, he couldn't say. If they were buried forty feet from Cleveland avenue, the east line of the Boulevard did not come to their graves since only thirty-five feet on the east of Cleveland avenue was taken at this point. In the deed from H. C. Adair to the Montopia Land Co. of June 20, 1913, it is recited that owing to changed conditions it has become impracticable to use the land for a graveyard "and the bodies thereon are now being removed and said lands abandoned" for the purpose for which it was originally reserved. And at the time of the trial, November, 1914, the evidence disclosed that all graves on said tract had been removed, the little brick inclosure removed and nothing left to mark the former location of the graves. The evidence is that the brick inclosure was taken down "within the last few months" just prior to the trial. The testimony of the witnesses as to the location of the graves shows that they were depending upon their recollection of what they had observed in former years as to the location of graves with reference to the boulevard. While certain of them say the boulevard encroached even on the graves in the brick inclosure, yet there is clear evidence that the brick inclosure was not taken away until after the grading of the boulevard was finished, and that the west line of said brick structure stood about twenty feet east of Swope Parkway. If this is true, then the other witnesses were mistaken in their remembrance of where the inclosure was located, and said boulevard did not extend that far. It is true two of the witnesses say the boulevard took in the grave of the Moon child, but one of these at first said, "it would be *nearly* in the street now" and although he after-

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wards stated that he was "confident" it was in the street, yet he afterwards qualified this by saying "as I recollect it" and his testimony shows he had never measured the distance of this grave from old Cleveland avenue and was merely giving his idea of its location based on his recollection of what he had observed in former years. He said the graveyard was first put there over forty years ago. If Cleveland avenue was established in 1886, the graveyard was there before the avenue was and hence was not located with any reference to the avenue. The witness said the graveyard abutted Cleveland avenue, the east line of said avenue being the west line of said yard, but on cross-examination admitted that he didn't know just where the lines of the graveyard were as they were never run. The other witness, in answer to the question whether the graveyard lay up against the east line of Cleveland avenue, said "I suppose it did" and "to the best of my recollection it did." And in answer to the question as to her recollection of the location of the Moon child's grave whether it was now in the Parkway, she replied, "To the best of my recollection it would be." But when asked on cross-examination if she was certain about it, she replied, "No, sir, I couldn't swear that it is, but to the best of my knowledge it is." And when asked if she would undertake to say that the east line of Swope Parkway takes in any of the graveyard, she replied, "From the way I thought it used to lie I would think it did."

It is clear from the evidence in the record that all the graves had been there a long time and if the Parkway did not reach to or disturb the brick inclosure on the graveyard, there was nothing to indicate to the company doing the grading in 1912 that the graveyard was being encroached upon, and the deed from William Adair to H. C. Adair dated July 11, 1907 (on record since April, 1909), would lead one to believe that the west line of said graveyard was 75.5 feet east of the center line of the boulevard, and therefore not within its limits. Under all these circumstances, and

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considering the fact that the boulevard had been laid out since 1909, that no objection had been made to its occupancy of the ground, and none has even yet been made by anyone claiming to own or have an interest in it, that no boundaries of the graveyard were definitely shown until the deed of July 11, 1907, seemed to locate it outside of the boulevard, we fail to perceive any grounds whereon a court of equity should base a cancellation of the tax bills and cause the grading company to lose payment for work done in good faith and with no notice that there could be even a claim that the grading was not on public property. At no time since the boulevard was opened in 1903 has anyone laid claim to any part of the right of way thereof or objected to its being occupied as a highway. None of plaintiffs can claim any interest therein, but, in order to defeat the tax bills, they assert it is privately owned by other parties whom they do not represent and for whom they are not authorized to speak.

2. The next two portions of said boulevard, said to be private property, have to do with what are termed the Nelson & Pitrat tracts. One Flacey owned a tract 493.30 feet north and south, the west line of which was the center line of the northeast quarter of said section 3, which as heretofore stated was the center line of Cleveland avenue. This ground lay immediately south of the Collier tract herein above referred to. On March 30, 1903, Flacey conveyed the north half of his land to Emory Nelson and the south half to Anna L. Pitrat. Nelson and Pitrat signed the right-of-way deed hereinabove referred to and described therein "a strip thirty-five feet wide across our entire frontage on Cleveland avenue" for the purpose of widening Cleveland avenue to 150 feet instead of eighty feet and for boulevard purposes. This deed was signed by them on March 27, 1903 (three days before they got title to the land), and plaintiffs therefore say such dedication is not valid because of the rule that no one but the holder of the title can dedicate. The right-of-way deed was filed in October, 1903.

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This was long after Nelson and Pitrat got the title, and since the establishment of the entire length of Swope Parkway was not finally completed till in the fall of 1903, no doubt the right-of-way deed did not *take effect* until then. But plaintiffs say that because no covenants of warranty were contained in the right-of-way deed the doctrine of after acquired title will not operate to validate the attempted dedication. But more than ten years have elapsed between the date Nelson and Pitrat obtained title and the date this suit was brought. Neither Nelson nor Pitrat, nor any person owning this property, have at any time ever made any claim to the strip they sought to dedicate by joining in the right-of-way deed. During all this time it has been open to and used by the public. They do not join in this suit and, so far as known, to this day make no objection to the use of the ground as a public highway, and it was accepted by the public authorities and has been under their control and dominion ever since. Such conduct on the part of the owners of the ground clearly evinced an intention to dedicate it after they had the title, and if the right-of-way deed was not a valid statutory dedication, it was good as a dedication at common law. [Rose v. City of St. Charles, 49 Mo. 509; McGrath v. City of Nevada, 188 Mo. 102; Elliott on Roads and Streets, sec. 159; Jones on Easements, sec. 440; Kansas City Mill Co. v. Riley, 133 Mo. 574.]

3. The next tracts said to be private property consist of two lots which abutted Cleveland avenue on the east side thereof owned by the Swope Park Realty Company. This company joined in the right-of-way deed to relinquish thirty-five feet necessary to make the 150 foot boulevard. It is urged that because the corporate seal of the company was not affixed to the deed, the strip still remains private property. As the company had a seal and it was not affixed, doubtless the failure to attach the seal made the deed insufficient as a conveyance of the company's legal title. But the company has never complained and is not now

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doing so. The dedication attempted by the Company was accepted by the public and is valid as a common-law dedication if not good otherwise. [State v. DeVall, 157 Mo. App. 587; 13 Cyc. 441.] Such a deed is good in equity where the grantee is in possession and cannot be disturbed. [Pullis v. Pullis Iron Co., 157 Mo. 565.]

4. The last tract said to be private property is a strip thirty-five feet wide off the east side of a tract 100 feet long north and south by 190 feet wide east and west, lying in the northeast corner of the northwest quarter of the southeast quarter of said section 3, which said thirty-five foot strip was necessary to be added to the west side of Cleveland avenue at that point to make the 150 feet of said boulevard. David C. Mastin owned all of said above named quarter-section, and in 1889 he deeded the above-mentioned 100 by 190 foot tract to certain trustees, and their successors in office, for a church lot. The deed was not filed for record until September 10, 1897, meantime the said quarter-quarter section was deeded, without any reservation or exception of said church lot, to Thomas H. Mastin by deed filed January 15, 1891, and later another deed was made to him, still with no reservation, which was filed November 29, 1893. On July 14, 1909, the widow and all of the heirs of Thomas H. Mastin conveyed to said trustees for the church the aforesaid tract of 100 by 190 feet "subject to the right of the public to use the east seventy-five (75) feet of the property hereinbefore described as a portion of Swope Parkway." The trustees of said church joined in said right-of-way deed hereinbefore mentioned, but it is contended that as said trustees did not have an unlimited estate in fee their relinquishment of the thirty-five foot strip for the boulevard was invalid. The contention being that inasmuch as the church lot might revert, if devoted to other than church purposes, the trustees had only a determinable fee. There was no reverter mentioned in the deed. It may be

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observed that if such reverter were possible, the owners of the reversion have, in their deed of July 14, 1909, recognized and consented to the rights of the public in said thirty-five foot strip, and the trustees in accepting said deed, and also by joining in said right-of-way deed, have consented, as far as lies in their power, to the dedication of said strip to the boulevard. It is not shown that the trustees acted without authority from the church for whose benefit and under whose direction they held the property. They are presumed to have acted by authority. The act of the trustees in consenting to an easement of thirty-five feet on the east side in order to create a beautiful boulevard in front of the church, is not disposing of the property in a manner inconsistent with the purposes of the trust. Trustees can properly dedicate property to a public use not inconsistent with the trust. [39 Cyc. 327; Prudden v. Lindsley, 29 N. J. Eq. 617.] No complaint of the trustees' action has ever been made by the church, nor has it at any time raised any objection to such dedication or to the boulevard. The lapse of ten years would bar the church from reclaiming it. [Hoke v. Central Farmers Club, 194 Mo. 576.] The facts certainly do not justify a court of equity in declaring that this strip is private property and upon that view decree the cancellation of the tax bills in controversy at the behest of parties who have no claim nor interest in said tract, and when no one interested therein has raised any objection to the dedication of said strip to public use and there is not the remotest likelihood of their doing so even if it were possible for such objection to succeed.

The judgment of the chancellor dismissing the bill is affirmed. *Ellison, P. J.,* concurs, *Bland, J.,* not sitting.

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HARTFORD FIRE INS. CO., Respondent, v. SAM L. CASEY et al, Appellant.

Kansas City Court of Appeals, January 29, 1917.

1. **PRINCIPAL AND SURETY: Failure to Notify Surety of Principal's Dishonesty: Release of Surety.** As to surety bonds which are silent on the subject of notice, failure to notify the surety of any dishonest conduct on the part of the principal coming to the knowledge of the obligee will release the surety as to all losses suffered subsequent to the obtaining of such knowledge.

2. ———: **Notice of Lack of Diligence: Release of Surety.** But the obligee's knowledge of mere negligent inattention to business, failure to attend to it promptly, a want of diligence or something of that kind, not amounting to a lack of integrity on the part of a bonded agent, will not require notice thereof to be given the surety by the obligee, unless the surety, by inquiry, creates such obligation.

3. ———: **Waiver of Notice: Release of Surety.** Even though the obligee in the bond of a fire insurance agent had knowledge that the agent had converted balances to his own use and was therefore dishonest to the extent of using money not his own although he afterwards paid up, still, plaintiff's failure to notify surety did not release the surety where the bond contained an express agreement on the part of the surety obviating the necessity of notice, the surety making no inquiry and the obligee being guilty of no concealment, although the waiver clause would not authorize the obligee to set back and intentionally invite an agent, known to be a thief and known to be stealing, to continue on and steal more.

4. ———: **Alteration of Agency Contract: Discharge of Surety.** Where the changes made in the dealings between the agent and his company were mere changes in the method of doing business and in the rules governing same, and were not changes of the contract of agency or of the contract of suretyship, and did not increase the surety's risk, they did not have the effect of releasing the surety.

5. ———: **Amount of Liability on Surety Bond: Attorney Fee.** The obligee cannot recover more than the penalty of the bond and where it contains a stipulation for an attorney's fee, this means that the fee shall be considered as a part of the damages within the amount of the bond and not that the fee may be collected in addition to the amount of said bond.

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6 .———: **Termination of Agency: Discharge of Surety.** After a fire insurance agent got behind with his remittances to the company, the latter suspended his authority to write new risks until he should make full payment, but his authority to perform many other agency duties was not disturbed and he continued to perform them and to remit from time to time until his balance due had been fully paid up when he resumed the writing of risks. During the few days he wrote no new policies he continued in charge of the office and was the company's agent. *Held*, that the trial court sitting as a jury was justified in holding that there was no termination of the agency relation nor creation of a new contract in relation thereto, and that the surety could not rightly claim to be discharged on that account. Nor does the fact that the company notified the agent not to write new insurance as the company was preparing to suspend operations in the State, constitute a disruption of the agency relationship, where the company did not in fact suspend and the principal and agent never contemplated that the agency was terminated.

Appeal from Jackson Circuit Court.—*Hon. Kimbrough Stone,* Judge.

AFFIRMED (*conditionally*).

Frank P. Brumback for appellant.

W. B. Kelley for respondent.

TRIMBLE, J.—Plaintiff insurance company sues upon a bond given to it by one of its agents for the faithful performance of his duties. The agent, Sam L. Casey, and principal in the bond, filed no answer in the case. The surety, William A. Nettleton, made defense. A jury was waived and the cause was tried by the court. Judgment was rendered in plaintiff's favor for $2500 the full amount of the bond, and for $250 attorney's fee, aggregating the sum of $2750. The surety has appealed.

Casey was appointed agent April 1, 1904, and the bond was executed and delivered on that date. It was in the regular form of a bond in the sum of $2500 with the collateral condition therein that:

"If the said Sam L. Casey, shall in all respects faithfully and well, perform his duties as such agent

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and observe and fulfill the instructions and directions, general and special, which may from time to time be given to him by said Company and its authorized officers and agents, and duly and punctually, account for, pay over and properly apply all premium moneys due and payable upon and by the terms of policies issued by the said agent, whether at that time collected by the said agent or not, and all other sums of money, which may come to him as such agent, or for and on account of said Company, and duly and properly account for and apply all goods, chattels, or other property, which may come into his possession, or under his control, as such agent, or for said Company, and, upon the termination of his agency, from whatever cause, immediately account for, and pay over unto said Company all moneys in his hands as such agent, or that may then be due from him to said Company, and deliver up to said Company, or such person or persons as it may designate all supplies, blanks, accounts, memoranda, records of business done for or upon account of said Company, and other property, things and effects of said Company, then this obligation to be void and of no effect, but otherwise to remain in full force and effect."

The instrument then closed with the following paragraph appearing just above the signatures:

"It is further covenanted and agreed by said above bounden parties, that, if suit be brought to enforce any of the obligations of this bond, the said Company shall, in case of recovery, be allowed a reasonable attorneys' fee, and all costs, expenses and cash outlays arising, to be paid in addition to the amount otherwise recovered; and the said sureties waive notice of any default the said above bounden principal may at any time make, and hereby agree that failure to give such notice shall not, in any manner, affect their obligations under this bond."

No question is made over the authority of the plaintiff to take the bond nor of its due execution. It is conceded that on August 9, 1913, the agent Casey

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was indebted to plaintiff in the sum of $2711.03 for premiums collected by him on policies issued during the months of April, May, June, July and August, 1913; and that on said date demand was made of said agent and his surety for the payment of said amount, and that payment has not been made. Suit was brought February 14, 1914.

The defense of said surety was made upon what may be divided into three grounds: 1. That on December 20, 1912, the plaintiff terminated the agency and suspended the authority of said agent to issue policies until he should pay all premiums due the Company and collected by him up to November 1, 1912; that afterwards, upon the payment of all sums due from him up to November 1, the company reinstated him as gent; that the surety knew nothing of this; and the suspension and subsequent reinstatement was, as to such surety, a cancellation of the old contract of agency and the making of a new contract, for the performance of which he was not liable. 2. That said agent, prior to December 20, 1912, had misappropriated and converted to his own use the premiums he had collected and then owed, and that plaintiff, with knowledge of said agent's dishonest conduct, neither notified the surety nor discharged the agent, but continued to allow him to act in that capacity, whereby the surety was released and discharged from liability for all losses arising from the subsequent defaults of such agent. 3. That during the continuance of said agency the plaintiff, without notice to the surety, changed the postage allowable to the agent from fifteen cents per policy to five cents, and required the agent to remit premiums in forty-five days after the issuance of the policy instead of seventy-five days, and that by reason of such changes in the contract of agency without notice to the surety, the latter was released.

With reference to the first ground above mentioned, the evidence discloses no discharge and reinstatement of said agent whereby a new contract of

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agency was created. It seems that the agent did get behind in his remittances to the Company and that a large amount of correspondence passed between them in relation thereto, the agent sending in small amounts from time to time and asking for time as to the balance due and giving various reasons for not sending same in at the time promised; and that finally the Company notified him that his authority to accept new risks was suspended until he should make settlement, and for a period of four days, according to plaintiff, and fifteen days, according to the agent, he wrote no new policies. But he had many other duties to perform in addition to writing policies, namely, collect premiums, make proofs of loss, cancel insurance and return premiums, report losses, adjust some of them, pay some of them and correspond generally with the Company in regard to the business. All these duties the agent continued to perform without interruption during the few days he did not write new insurance. He continued in charge of the office and of the plaintiff's business and the correspondence shows that he was still agent during that time. He paid up the amount due and resumed writing new risks and collecting new premiums. His compensation was not a fixed salary but was a commission of fifteen, twenty and twenty-five per cent, according to the character of the work done, and there was no change in said compensation from the time the bond was given in 1904 to the date of the ending of said agency in August, 1913. Under the evidence, the trial court sitting as a jury was clearly justified in finding that there was no termination of the agency or creation of a new contract in relation thereto, and that the surety could not rightfully claim to be discharged on that account. In April, 1913, the plaintiff, along with other insurance companies, having gotten at outs with the General Assembly over the passage of the Orr law, notified all its agents, including Casey, not to write new insurance until the matter was adjusted as the company was looking forward to being compelled to sus-

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pend operations in Missouri. This was not mentioned in the pleadings as a termination of the contract of agency, but even if it had been, we do not think it would constitute any disruption of the agency relationship existing between plaintiff and Casey. Certainly the parties never contemplated that such was the result. Nor did such notification have the effect of releasing all agency bonds and the requiring of new ones. This last notice was no more a termination of the agency and the creation of a new contract in regard thereto than was the former notice.

As to the second ground upon which release is claimed, namely, that the company did not notify the surety of the agent's falling behind in remitting his premiums, the general rule is well settled, as to bonds which are silent on the subject of notice, that failure to notify the surety of any dishonest conduct on the part of the principal coming to the knowledge of the obligee, will release the surety as to all losses suffered subsequent to the obtaining of such knowledge. [Phillips v. Foxall, 7 L. R. Q. B. 666; Charlotte etc. R. Co. v. Gow, 59 Ga. 685; Rapp v. Phœnix Ins. Co., 113 Ill. 390; Connecticut Mut. Life Ins. Co. v. Scott, 81 Ky. 540; Farmers Bank of Deepwater v. Globe Surety Co., 192 Mo. App. 243.] And it is also the rule that knowledge of mere negligent inattention to business, failure to attend to same promptly, a want of diligence or something of that kind, not amounting to a lack of integrity, on the part of the bonded agent, will not require notice thereof to be given the surety by the obligee, unless the surety by inquiry creates such obligation. [Home Ins. Co. v. Holway, 8 N. W. 457; Elliott v. Qualls, 149 Mo. App. 482; Wilkerson v. Crescent Insurance Co., 40 S. W. 465; Watertown Fire Ins. Co. v. Simmons, 131 Mass. 85; Lake v. Thomas, 36 Atl. 437; Harris v. Newell, 42 Wis. 586.] So far as concerns the evidence offered by plaintiff and the correspondence between the company and the agent with reference to the balances due from the latter, there does not appear to be anything

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disclosing dishonesty on the part of the agent at the time he got behind in the latter part of 1912, any more than that the fact he had not remitted and was not able to do so would tend to indicate that, technically, he might be guilty of embezzlement; but he paid up these amounts, thereby disclosing that he was not intentionally seeking to get away with plaintiff's property but was honestly paying what was due from him. However, conceding that plaintiff had knowledge that the agent had converted the balances due to his own use, and was, therefore, dishonest to the extent of using money not his own although he afterwards paid up, still we do not think plaintiff's failure to notify the surety was ground for the latter's release under the circumstances herein and the express agreements of this particular bond. As stated before, the bond contained a specific agreement to the effect that "the said sureties waive notice of *any default* the said above bounden principal may *at any time* make, and hereby agree that failure to give such notice shall not in any manner, affect their obligations under this bond." This was an express agreement on the part of the surety obviating the necessity of notice. He made no inquiry at any time to inform himself as to the way in which the agent was carrying on the business; nor was the plaintiff guilty of any concealment of the agent's conduct. We may grant defendant's contention that this waiver clause would not authorize plaintiff to intentionally sit back and invite an agent, *known* to be a thief and *known* to be stealing, to continue on and steal more, with the idea on plaintiff's part that no matter if he did continue to steal, his surety would make good the loss. Such conduct on plaintiff's part would be tantamount to fraudulent collusion with the agent whereby plaintiff would consent to the stealing with the expectation of being reimbursed therefor by the agent's surety. The evidence does not afford room for that view of the case, nor did the instructions asked by defendant, and which were refused by the court, cover that extreme situation.

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The third ground relied on, to-wit, that a change was made in the amount of postage allowed and in the time of remitting of premiums is insufficient to release defendant. The agent was not on a fixed salary. His compensation was the commissions above mentioned. No change was made in them. The matter of postage was not a part of the contract of agency which the surety agreed to guarantee. It seems that it had been a custom for agents to take credit for postage at the rate of fifteen cents a policy written, and that, although this exceeded the postage used, the company allowed it to be done, until by agreement of all insurance companies the matter of postage was regulated and reduced to five cents a policy, and this more than covered the postage used. The lessening of the time the agent should allow his customers to pay their premiums was not a change of the contract of agency or of defendant's contract of suretyship. It did not increase defendant's risk. One of the conditions of the bond was that the agent should "observe and fulfill the instructions and directions, general and special, which may from time to time be given to him by said company and its authorized officers and agents." And the change of time of remittance was merely a change in one of the general rules of the company and comes within the above quoted provision. The bond makes no mention of the compensation the agent is to receive nor as to the details of the agreement between the agent and the company. If the surety had thought any of the details thereof was an essential ingredient of the contract of surety, then it would seem that a stipulation should have been expressly inserted in the bond that they would be liable only so long as such details remained the same [Frank v. Edwards, 8 Exch. 214.] The matters changed were not such as were essential ingredients in the contract of surety and therefore what was done with respect to them did not have the effect of releasing the surety. [Amicable, etc. Ins. Co. v. Sedgwick, 110 Mass. 163; Harper v.

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National Life Ins. Co., 56 Fed. 281; Taylor v. Standard Life Ins. Co., 66 N. W. 647; 32 Cyc. 182.]

As stated, the full amount of the bond was $2500. The damages exceed that amount, and the court rendered judgment for the face of the bond. But the court also rendered judgment for $250 attorney fee in addition to the full amount of the bond. We think this was erroneous. It is true the bond contains a stipulation for the payment of an attorney's fee, expenses and cash outlay, if suit be brought on the bond. But this stipulation has reference to *the damages* that may be recoverable upon a violation of the bond and is not a part of the penalty of the bond. In other words, the agreement that an attorney's fee may be recovered means that it may be recovered as a part of the *damages within the amount for which the surety has agreed to be bound.* The suit is on the bond and the surety has agreed to be bound to the extent of $2500 if the obligee's damages shall be that much, but that is the extent to which he has agreed to be bound. He is not required to pay more than the damages actually sustained although they exceed the amount of the bond. Section 1240, Revised Statutes 1909, provides that judgment shall be rendered for the penalty of the bond and plaintiff shall have execution for the damages assessed. Of course, if the damages assessed exceed the penalty of the bond the plaintiff cannot recover such excess from the surety since there is no judgment for anything except the penalty of the bond and *no authority for any execution except for the damages within the penalty.* The general rule has always been that plaintiff cannot recover more than the penalty of the bond. [Farrar v. Christy's Admr., 24 Mo. 474; State ex rel. v. Woodward, 8 Mo. 353; State ex rel. v. Sandusky, 46 Mo. 381; Board of Education v. National Surety Co., 183 Mo. 166, 184; Sholes v. Freeman, 81 Mo. 540.] An attorney's fee is a part of the loss sustained by an obligee when compelled to sue on a bond. In other words, it partakes of the nature of the damages sustained, and the agreement to pay same

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makes it a part of such damages. But the bond does not provide for protection against damages beyond the amount of the penalty. As to such damages in excess of the penalty the obligee must stand the loss himself or at least look elsewhere than to the surety. Consequently when the attorney's fee, made a part of the damages by a clause to that effect in the bond, forms a part of the excess above the face of the bond, then the obligee must stand the loss of that too, at least so far as the surety is concerned. The judgment in this respect can be remedied by remittitur. If, therefore, the plaintiff will, within ten days from the date of the announcement of this opinion, enter a remittitur of said $250 with all interest thereon from date of judgment, the judgment will be affirmed. Otherwise it will be reversed and remanded. All concur.

HARRY L. JACOBS, Respondent, v. WESTERN UNION TELEGRAPH COMPANY, Appellant.

Kansas City Court of Appeals, February 12, 1917.

1. **TELEGRAPH AND TELEPHONES: Delay: Proximate Cause: Knowledge: Face of Telegram.** A telegram was addressed to the sendee as an attorney in which it was stated that two law suits would be heard "at Ottumwa next Thursday" stating the nature of the suits and that "Counsel will have preliminary conference at Ottumwa Wednesday." The sendee had been employed as an attorney in the cases. Delivery of the message was delayed for ten days and he in consequence did not go to Ottumwa and lost his fee. It was *held* that the delay in delivery was the proximate cause of loss of the fee; and that the face of the telegram sufficiently showed the probable result of a failure to deliver.

2. **———: Contract: Breach: Damage: Proximate Cause.** Where according to the usual course of things, a certain result will follow the breach of a contract, or a duty founded on contract, the damage from such result is not remote and the breach is the proximate cause of the damage.

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3. ———: **Interstate Commerce: Federal Decisions.** A telegram to be sent from one State to another is interstate commerce and Federal laws and decisions are of controlling influence in disposing of litigation arising thereon.

4. ———: **Limitations of Liability on Back of Message: Repeated Message.** Printed stipulations on the back of a telegram blank limiting liability for delay, mistransmission and misdelivery, of the message written thereon unless repeated, are valid. But the provision as to repeating the message will not apply where the message has been correctly transmitted, the fault being merely in neglect to deliver.

5. ———: **Stipulation: Limit to Cost of Message: Invalidity: Negligence.** A stipulation that a telegraph company will only be liable for delay in delivery for the sum paid to it for transmitting the message unless it is repeated, is not a stipulation limiting liability; but is, really, a stipulation against *any* liability for the negligence of such company, and the right to make such stipulation should not be allowed.

6. ———: **Valued Message.** The printed stipulation on the back of a telegram that the message is valued at fifty dollars and limiting all liability to that sum is valid.

7.. ———: **Printed Stipulation: Action by Sendee.** The printed stipulations on the back of a telegram limiting the liability of the company may be invoked by the company in an action brought against it by the sendee.

8. **INTERSTATE COMMERCE COMMISSION: Rates: Presumption.** It will be presumed, in the absence of a showing to the contrary, that a telegraph company has filed with the interstate commerce commission a copy of its rates, limitations, exemptions, and schedules.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas,* Judge.

AFFIRMED (*conditionally*).

New, Miller, Camack & Winger, Albert T. Benedict, and *S. J. McCullough* for appellant.

Ringolsky & Friedman and *J. F. Aylward* for respondent.

ELLISON, P. J.—Plaintiff's action is to recover damages for wrongful negligence in defendant's failure to deliver a telegram. He obtained a judgment in the circuit court for two hundred and eighty dollars.

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The telegram was what is known as a "night letter" and was in the following words:

"Cincinnati, Ohio, July 21, 1913.

To Harry L. Jacobs, Attorney,
Kansas City, Missouri.

Two suits involving Iowa interstate liquor shipments will be heard at Ottumwa next Thursday. One suit is against United States Express Company to enjoin it from delivering shipments. In the other suit consignees for personal use are defending against seizures. Counsel will have preliminary conference at Ottumwa Wednesday. I expect to attend.
Paid. LAWRENCE MAXWELL."

The telegram was written on one of defendant's blanks upon which there was printed matter limiting liability. Among other limitations was one that defendant should not be "liable for mistakes or delays in the transmission or delivery, or for nondelivery for any unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery or nondelivery of any repeated message, beyond fifty times the amount received for sending the same, unless specially valued; . . . In any event the company shall not be liable for damages for any" such mistakes or delays "whether caused by the negligence of its servants, or otherwise, beyond the sum of fifty dollars, at which amount this message is hereby valued, unless a greater value is stated in writing," and an additional sum paid on such value.

It was shown that this telegram was not delivered to plaintiff until the expiration of eleven days from its date and ten days after its receipt at Kansas City. The only excuse offered for delayed delivery was that the city directory only showed a "Harry Jacobs" and not a "Harry L. Jacobs" as addressed on the message. It was further shown that plaintiff had been employed by Dancinger Brothers wholesale liquor dealers in Kansas City to attend the trial of the two suits mentioned in the telegram. Lawrence Maxwell, the

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sender of the message, was attorney for the wholesale liquor dealers association and plaintiff had arranged with him that he would keep plaintiff posted regarding the suits mentioned in the telegram. In consequence of the nondelivery of the telegram plaintiff did not attend the trials and he thereby lost his employment by Dancinger Brothers and lost the fee he should have otherwise received from them.

The issues to be considered are whether the failure to deliver the telegram was the proximate cause of plaintiff's loss; and whether the limitation clause above referred to as appearing on the back of the telegram are applicable to the facts. Other things were matters of dispute at the trial, among them, whether plaintiff had a contract with Dancinger Brothers; but there was evidence tending to show that he had, and the verdict has so determined it, and we think rightly determined it, in plaintiff's favor.

It is insisted that the failure to deliver the telegram was not the proximate cause of plaintiff's loss in that such loss could not reasonably have been within the contemplation of the parties. It may be true that the character of loss sustained by plaintiff was not within the contemplation of the sender and the company, but where the action is *ex delicto* (as here) covering a breach of public duty of which the sendee has a right to complain, any damage to him is properly allowed that flows directly and in the usual course of things from the breach of duty. In this case plaintiff's loss of a fee was not remote, it resulted directly, and in the usual course of such things, from defendant's wrongful act. [Kerns & Lorton v. Telegraph Co., 170 Mo. App. 642; Fitch v. Telegraph Co., 150 Mo. App. 149; Tippin v. Telegraph Co., 185 S. W. 539; Western Union Tel. Co. v. Lawson, 182 Fed. 369.] We have been cited to Hadley v. Baxendale, 9 Exch. 341 (S. C. 23 L. J. Ex. 179), as though that case restricted damages to such as were within the contemplation of the parties as probably to be the result of a breach. The case does not so restrict the rule.

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even in actions *ex contractu.* It is said in that case that the damages must be such as were within the contemplation of the parties; but that is only half of what was said. The language was this: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered *either* arising *naturally,* i. e. *according to the usual course of things,* from such breach of contract itself, *or* such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." So that the rule, as a whole, was formulated upon the idea that though certain damages might be of such character that they could not be reasonably supposed to have been contemplated at the making of the contract, yet if they were such as could naturally and reasonbly be considered, according to the usual course of things, to result from a breach, the party at fault would be liable for them.

But the case before us is not between the immediate parties to the contract. It is *ex delicto,* based upon a breach of duty where the basis of recovery, in common with actions *ex contractu,* is the damage naturally and in the usual course of things, flowing from such violated duty.

It is suggested that the defendant had no notice that a loss of a fee would be suffered by plaintiff in case of delay in delivery. But in our opinion the face of the telegram itself discloses that such would be the natural result. The telegram was information to defendant that plaintiff was an attorney and that he was being informed of the date when two suits would be heard and that there would be a conference of attorneys interested. It must have been known to defendant that attorneys receive compensation for services rendered and that they will not receive compensation if they fail to render the service. [West. Union Tel. Co. v. Short, 53 Ark. 434, 444.] The subject of informa-

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tion disclosed by face of telegram is discussed in Kerns & Lorton v. Telegraph Co., 174 Mo. App. 435, 440. The case is wholly unlike Melson v. W. U. Tel. Co., 72 Mo. App. 111, where the message was simply: "If possible come to Shelbina in the morning," and it was held that this conveyed no information, or suggestion, to the telegraph company that it was contemplated by the sender to sell a horse upon which the sendee had a lien.

This brings us to that branch of the case relating to the limitation of defendant's liability to which we have already referred. The telegram being sent from Cincinnati, Ohio, to Kansas City, Missouri, was a transaction in interstate commerce and must be governed by the Federal law as interpreted by the Federal decisions. Congress, under its interstate commerce power, has assumed control of telegraph companies operating between the States. [36 Stat. at L. 544, chap. 309; Fed. Stat. Anno. 1912, Supp. Vol. 1, p. 111.] Federal laws and Federal decisions have thereby become the sole controlling influence in the determination of all litigation in respect thereto. They have superseded all State regulation and rule of decision wherever in conflict. [Western Union Tel. Co. v. Milling Co., 218 U. S. 406; Western Union Tel. Co. v. Pendleton, 122 U. S. 347.] "A telegraph company occupies the same relation to commerce as a carrier of messages, that a railroad company does as a carrier of goods," (Telegraph Co. v. Texas, 105 U. S. 460), and therefore the many announcements of the exclusive control of the decisions of the United States Supreme Court relating to interstate shipments, and interstate liability acts to servants engaged in interstate commerce, are applicable. [Western Union Tel. Co. v. Bank, 156 Pac. 1175; Western Union Tel. Co. v. Bilisoly, 116 Va. 562; Haskell Imp. & Seed Co. v. Postal Tel. Co., 114 Maine, 277.]

The Federal courts have ruled that stipulations set out on the back of telegraph blanks concerning

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repeated messages and lessening the amount of liability for delays, misdelivery and incorrect transmission, are valid. [Primrose v. Western Union Tel. Co., 154 U. S. 1.] But we think there is no ground in this case upon which to apply the limitation to the price of the message on account of it not having been repeated; for the reason that the mischief committed here was not in the transmission. It was correctly sent and therefore to repeat it, would not have had any tendency to lessen the ten days' delay in delivery. The message was in every way right; the wrong was in carelessness in seeking plaintiff and failing to deliver to him. There was nothing in the message that caused the delay, or that a repeating of transmission would have cured. To repeat a message will correct any error in transmission, but how it could have any influence or application to failure to deliver to the sendee is difficult to understand. In putting a message on and taking it off the wire twice the chances of mistake are greatly lessened, but we do not see where, or how, it could affect the mere matter of delivery to the sendee. That part of the company's limitation of liability for an undelivered, unrepeated message can only apply to something where repeating would reasonably tend to its benefit in the matter of delivery. Thus, if error was made in the name or address of the sendee, it would directly affect the delivery. But if the entire telegram is right in the first instance, this reason does not exist. We therefore reject the insistence that defendant's liability was limited by the endorsement on the message blank to the price of sending an unrepeated message. [Western Union Tel. Co. v. Henderson, 89 Ala. 510, 520; Railway v. Wilson, 69 Texas, 739; Western Union Tel. Co. v. Graham, 1 Colo. 230, 235; Thompson v. Tel. Co., 107 N. C. 449, 457.]

Furthermore, while it is unnecessary to decide the point and we do not do so, yet it may be suggested that, a contract limiting a telegraph company's liability merely to the charge it has collected for trans-

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mitting a message is not, properly speaking, a contract at all. Such companies are public institutions compellable, for a reasonable charge, to transmit all messages properly offered. They accept a message agreeing with the sender to transmit and deliver it, and negligently fail to do so. Now a stipulation by such company that its liability is limited merely to the amount received for sending the message is not a limitation of liability, but is a declaration that there is *no* liability; since the sum paid would be due the sender by reason of the unperformed service, without such stipulation. The so-called agreement is nothing more than a claim of one sided right to wrongfully fail to perform the contract without being responsible for any damage occasioned by the wrong. It may be such stipulation would be good where the failure of the company is *unavoidable,* but to assert an unqualified release from all liability save to refund the charge collected for the unperformed service, is, in effect, to claim nonliability for negligence.

In stating reasons for upholding such stipulations, they have been likened to agreements between shipper and common carrier whereby in consideration of a rate of carriage based on a certain value, in case of negligent nonperformance resulting in loss of the property, the liability is limited to that value, such as in Hart v. Pennsylvania. Ry. Co., 112 U. S. 331 and Harvey v. Railroad, 74 Mo. 538. In such instance there is a sum agreed upon as the value of the shipment, and it must be paid to the shipper as his damage; but what would be thought of a provision that he could only get back the freight he had paid for the unperformed contract?

Conceding that Congress has legislated on the question of *liability* of telegraph companies and thereby the rulings of the Federal courts have become controlling on State courts, it would not aid defendant, for we do not find that the cases cited are applicable [Primrose v. Western Union Tel. Co., 154 U. S. 1; Western Union Tel. Co. v. Hall, 124 U. S. 444;

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Gardner v. Western Union Tel. Co., 231 Fed. 405; Western Union Tel. Co., v. Coggin, 68 Fed. 137.] The first of these involved an error in transmission of an unrepeated message in cipher, on account of which the plaintiff charged that he was damaged in a large sum; and the court held that the limitation of liability to cost of message was valid and applicable. The second case does not touch the question at all. It involved a rule of damages, and as the plaintiff failed to show that he had suffered any legal damage, he was permitted to recover only nominal damages. The third case was likewise without application. It is there merely decided that a provision for a sixty day limit for presentation of claims was valid. Nor is it seen where the fourth case bears, even remotely, on the question before us. The case was for error in transmission of an unrepeated message, apparently partly in cipher and involved merely a question whether any damage was shown by reason of an error when there was nothing in the face of the message or in the evidence to show that damage would probably or reasonably result from its nondelivery as written or that the sendee would have understood it if it had been delivered as written. In this connection we think it worthy of remark that if the rule limiting liability to the price paid for the message is to be enforced, why do not the courts place it squarely on that ground and stop at that, instead of ignoring such provision and seeking other reasons for finding no damage, as in Western Union Tel. Co. v. Hall, and Western Union Tel. Co. v. Coggin, supra.

The cases cited from State courts are instances where the error related to transcribing at the sending office, or transmission over the lines, or transcribing at the receiving office; instances of error in which it is readily seen that repeating would correct; though we do find at least one case where the limitation has been applied to mere unexplained or unnecessary delay. [Clement v. Western Union Telegraph Company, 137 Massachusetts 463.]

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But the provision, as above set out, limiting the liability to fifty dollars for mistakes or delay in transmission, or delivery, finds application to the case and must control our disposition of it. For that was the value endorsed on the back of the message and became a part of the contract. [Donoho v. Railroad, 193 Mo. App. 610; Wright v. Railroad, 181 Mo. App. 137; Adams Express Co. v. Croninger, 226 U. S. 491; Hart v. Railroad, 112 U. S. 331; Boston & M. Railroad v. Hooper, 233 U. S. 97.]

And the fact that this action is brought by the sendee of the message does not prevent the defendant company from claiming the benefit of the limit of recovery. It is true the action is not between the immediate parties to the contract. But the contract created a duty of prompt delivery by the company, for a violation of which the sendee may maintain an action sounding in tort. He gets his action through the instrumentality of the contract, and out of which his right must arise. He must therefore accept the provision of the contract which limit the undertaking of the company. [Gardner v. Western Union Tel. Co. 231 Fed. 405; Findley v. Western Union Tel. Co., 64 Fed. 459; Whitehill v. Western Union Tel. Co., 136 Fed. 499; Western Union Tel. Co. v. Bank, 156 Pac. Rep. 1178; McGehee v. Western Union Tel. Co., 53 Southern 205; Frazier v. Western Union Tel. Co., 45 Oregon, 414; Stone & Co. v. Postal Tel. Co., 31 R. I. 174.]

Plaintiff to save himself from the application of the law which defendant has invoked against the judgment, claims that when Congress placed telegraph companies within the provisions of the interstate commerce act as common carriers, they became subject to the same regulations and restrictions applicable to other common carriers and that as the latter carriers are required to file with the Interstate Commerce Commission and print and keep open for inspection schedules, showing rates and charges for transportation, so telegraph companies should do likewise.

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It seems that the Interstate Commerce Commission (25 Annual Report, page 5) has decided that section 6 of the Interstate Commerce Act requiring other common carriers to print and file with that commission its rates, charges, etc., does not apply to telegraph companies. But it appears that the Federal Court of Appeals has decided differently. [Gardner v. Western Union Tel. Co., 231 Fed. 405, 409.] Under the latter decision plaintiff insists that as defendant did not show compliance with these requirements, it did not bring itself within the protection of the law we have referred to in its behalf. We need not stop to discuss the conflict between the Commerce Commission ruling and the Federal decision. For, conceding that the schedules, rates and charges should have been filed, it will be presumed they were, and the *onus* is on plaintiff to show they were not.

It is true that it has been held in some of the States to be necessary for the carrier to make this showing. But late cases in the supreme court of the United States show that not to be the view of the Federal Courts; and it is held, directly, that the presumption is to be indulged, in the absence of a showing to the contrary, that the carrier has complied with the law in filing with the Interstate Commerce Commission its schedules, rates, charges, exemptions, etc., as required by the law. [Cinn. & Tex. Pac. Ry. Co. v. Rankin, 241 U. S. 319, 326; N. Y. C. & H. R. Ry. Co. v. Beaham, 37 S. C. Rep. 43 (U. S. Sup. Ct.).]

Many of the points involved in this case are also discussed in an opinion by Judge TRIMBLE in Poor v. Western Union Tel. Co., promulgated at the same sitting at which this is announced. The result of the foregoing considerations is that plaintiff is limited to fifty dollars as the agreed value of his message. The judgment will therefore be affirmed if he will remit down to that sum within ten days; otherwise it will be reversed and cause remanded. Costs of appeal against the plaintiff. All concur.

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CASES DETERMINED

BY THE

ST. LOUIS KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

MARCH TERM, 1917.

ROBT. L. SEARCY, Respondent, v. ANNA SEARCY, Appellant.

Kansas City Court of Appeals, March 5, 1917.

1. **DIVORCE: Former Judgment: Res Adjudicata.** Where, in a former suit by a husband for divorce, the judgment was against him, it is *res adjudicata* as to all acts of the wife prior thereto of which the husband had knowledge and could have offered evidence in support of, and will bar a subsequent suit based on the same grounds, in the absence of any facts subsequently occurring to create a new cause of action.

2. ———: ———: ———: **Failure to Object to Evidence.** The evidence of such acts occurring before the former suit was admissible along with any subsequently occurring facts giving rise to grounds for divorce since they would emphasize and strengthen any such subsequent facts. Hence, the fact that defendant in the subsequent suit did not object to the introduction of the prior facts in evidence does not affect the right to apply the bar of *res adjudicata*, where, as soon as it was discovered that plaintiff was not relying upon anything new, the rule in bar was invoked.

3. ———: ———: ———: **Suit for Alienation of Affection as New Ground for Divorce.** An amendment to a petition for divorce, offered after judgment and submission of a motion for new trial, alleging that since a former suit by plaintiff for divorce, defendant had begun a suit for alienation of affections without justification, in absence of evidence that the alienation suit was without justification, is insufficient to prevent the bar of the second divorce suit by the judgment for defendant in the former suit.

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4. ———: ———: ———: ———: **Settlement: Admission.** That a wife accepted in settlement of her suit for alienation of her husband's affections a sum in consideration of which she released him from all obligations for maintenance and support, and released the defendants in the alienation suit, was no admission on her part that her suit had no justification.

5. ———: **Desertion: Evidence.** Where a husband left because his wife objected to the presence of another woman in the home, and after he left he did not reveal to his wife his whereabouts though she tried repeatedly to ascertain where he had gone, he is not in a position to claim that his wife deserted him.

Appeal from Jackson Circuit Court.—*Hon. C. A. Burney,* Judge.

REVERSED.

Rees Turpin for appellant.

John M. Cleary and *Mord M. Bogie* for respondent.

TRIMBLE, J.—Herein a husband sued for divorce which the trial court awarded. The wife appealed.

The suit was instituted April 14, 1915. The petition alleged that the parties were married August 28, 1901, and lived together till the —— day of September, 1907, when the husband left his wife, being compelled to do so by her cruel and barbarous treatment, and has ever since remained away from her. The petition further alleged that the wife was guilty of indignities such as to render his condition intolerable, and was guilty of such cruel and barbarous treatment as to endanger his life, that she continually nagged at, quarrelled and fussed with him so as to render life unendurable, the wife having an ungovernable temper and flying into a rage on the slightest provocation or upon no provocation. The only specifications or concrete instances of the wife's conduct stated in the petition was that on one occasion she threatened to strike him with a smoothing iron and would have done so had he not gotten out of the way.

The answer was a general denial and an allegation that the husband deserted the wife on September

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1, 1907, and that they had not lived together thereafter, together with a plea of *res adjudicata* wherein the wife set up that after such desertion, her husband brought suit for divorce in the circuit court of Jackson county at Independence upon the same charges and allegations as in the present suit, and the issues thereof were tried and a decree was rendered finding for defendant and dismissing the petition, in January, 1909. No cross-bill or prayer for divorce was filed by the wife.

The parties were married in Wisconsin and lived in Chicago for four years and until 1905 when they moved to Kansas City, the husband taking a position with his mother who was running a hotel. The wife says that they got along very well and happily while away from his folks. But the husband says his wife always quarrelled and nagged at him; that he could do nothing to please her. The greater portion of his testimony consists of statements or conclusions to this effect. He does, however, specify several instances of her alleged treatment of him, namely, once when her boy got into some trouble with the other children at the hotel, and the husband, having witnessed it, did not tell her of it. When she learned of it she asked her husband, when he came home, "Why did you not tell me about Claude getting into that trouble?" Nothing else is told of her conduct on that occasion. Another time he says she was ironing and threatened to hit him with the iron if he did not get out of the house. On another occasion he says he had been out as a musician playing at a dance given at the Country Club, and as the dance continued until three a. m., he did not get home until about four o'clock and found her getting ready to go down in the basement to start up the furnace; and that when he offered to go down, she refused to accept the offer saying, "I don't want any bum that stays out until four o'clock in the morning to do anything for me." His wife says that he would go out at night and not come back until the wee

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small hours of the morning and sometimes he would not come home at all, and when he did he would not tell her where he had been. His wife says that on one of these occasions he came in just as she was going down to fix the furnace, and he told her to stay in bed as he would fix it, but that she replied, "No you wont. No man that stays out all night can shake the furnace for me." On another occasion the husband says his wife threatened to strike him with a curtain pole. In none of these instances does he set forth the circumstances under which the matter arose. He does not state the facts showing the setting in which the event occurred. So that his testimony was very little more than mere conclusions as to his wife's treatment of him.

But however this may be, we think the wife's plea of *res adjudicata* should have been upheld, and will prevent plaintiff from obtaining the relief he has sought; and that her demurrer offered at the close of the evidence in chief should have been sustained.

It is conceded that he brought the prior divorce suit hereinbefore referred to and that the judgment therein rendered was against him. Plaintiff also admitted that everthing he testified to against his wife in the present suit happened *before* the other suit was brought, with the exception of a suit for alienation brought against his mother and relations, which will be referred to later. He also admitted that he *knew* of all the acts complained of against his wife before the former suit was brought, and that he *testified* in said former trial as to all of said acts with the possible exception of the curtain pole incident. The petition in the former case was introduced in evidence and it is practically the same as the petition in this case. Under such circumstances, unless something has occurred since the former judgment was rendered to create new or additional grounds for divorce, it would seem that the former judgment was *res adjudicata* in this suit. [Richardson v. Stowe, 102 Mo. 33, 44; Johnson v. United Railways Co., 243 Mo. 278, 289; Hines v. Hines, 243 Mo. 480, 495; Coleman v. Dalton, 71 Mo. App. 14, 21, 22; Lynch v. St. Louis, etc.,

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R. Co., 180 Mo. 169, 174; Cantwell v. Johnson, 236 Mo. 575, 603; Emert v. Aldridge, 231 Mo. 124; Viertel v. Viertel, 99 Mo. App. 710, 716; Ogden v. Chicago, etc., R. Co., 131 Mo. App. 331; Scientific American Club v. Horchitz, 168 Mo. App. 35.]

The fact that the curtain pole incident may not have been testified to in the former trial makes no difference. The cause of action herein is identical with that in the former suit, and the plaintiff could have brought forward that testimony then if he, in fact, did not do so. Whether certain testimony was offered in a former trial is not material unless the subsequent suit is on a demand different from or collateral to the cause of action in the former action. [Larue v. Kemp, 186 Mo. App. 57, 72; State ex rel. v. Center Mining Co., 262 Mo. 490, 501-2.]

The fact that defendant did not object to the introduction of plaintiff's evidence does not affect the right to apply the bar of *res adjudicata*. That evidence was admissible along with any subsequently occurring facts giving rise to grounds for divorce, and could be considered as emphasizing and strengthening any facts arising after the former judgwent. The defendant could not know the plaintiff was not going to introduce any new facts, but as soon as it was discovered that plaintiff was not relying upon anything new, the rule in bar was invoked.

The evidence disclosed that after the rendition of the judgment against plaintiff in the first suit, defendant brought suit against her mother-in-law and certain other relatives of her husband charging them with alienating her husband's affections. Thereupon, her husband and his mother paid her $1500 and obtained from her a written contract that, in consideration of the receipt of said sum, she released him from all past, present and future obligations for maintenance and support, and also released all of the defendants in her alienation suit from all claims for damages on that account and agreed to dismiss the suit, which was done.

After the wife's motion for a new trial in the case at bar had been argued and submitted, plaintiff obtained

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leave, over defendant's objections and exception, to amend his petition for divorce by inserting the bringing of said alienation suit against his relatives as an additional ground of divorce, it being alleged that said suit *had no justification,* and plaintiff was thereby compelled to pay her a large sum of money to get her to dismiss said suit to his great humilation, etc. It would seem that if there was no justification for the alienation suit, plaintiff was not *compelled* to pay anything to get it dismissed. Certainly the fact that she accepted $1500 in settlement thereof was no admission on her part that her suit had no justification for it.

Plaintiff claims that the bringing of this suit, *without justification,* subsequent to the adjudication of the former divorce suit, is a new ground for divorce upon which the decree in the present suit can be based. If the husband's relatives did in fact alienate his affection from his wife, it is hard to see how a suit by her against such relatives would give the husband a ground for divorce, especially if he had no other grounds. (And the former judgment was that he had none). This is, in effect, admitted, since the amendment says the alienation suit was without justification. But how can it be said that the suit was without justification, since there was no testimony offered on that issue? Indeed, there was no opportunity for the offering of evidence upon that point since the amendment to the petition was not made until long after the trial was over and after the motion for new trial had been argued and submitted.

Plaintiff in his brief urges the point that the spouse who drives the other from home and causes a separation by force or misconduct is guilty of desertion even though the guilty spouse continues to reside in the matrimonial home. His point is that since he testified that he was compelled to leave home or was driven from it by his wife, and since that condition has remained unchanged for more than the statutory period of one year, a cause of action for divorce based on desertion has ripened unto him *since* the judgment in the former

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suit, and for this reason the judgment rendered in the present case should stand. Several things may be said in answer to that. The shortest and most effectual of which is that desertion was not pleaded. In the next place, the judgment in the former case is an adjudication of the question whether he was driven from home or not, for if he was driven from home by his wife's cruel conduct he would have been entitled to a divorce then. Again, whatever else may be said of plaintiff's evidence in this case, it fails to show that he was compelled to leave home or was driven from home by his wife's conduct. It seems that at the hotel (owned by his mother), where the parties lived and worked, was a woman by the name of England or Ingland who was also an employee. The wife, so it appears from plaintiff's testimony, insisted that Miss England leave the house. Just why, does not appear, as the wife was not permitted by the court to show the reason. At any rate, the husband was opposed to Miss England's going, and when the wife insisted that she leave, *he* left and wrote defendant a letter, inclosing her some money, and saying, "I told you that if you ordered Englands out of that, I would go too and I feel as though I must keep my word, so goodby." So that plaintiff left because his wife insisted upon the discharge of the other employee and not because he was driven from home.

Furthermore, it appears from the evidence that after plaintiff left, he did not reveal to her his whereabouts; and, although defendant tried repeatedly to ascertain where he had gone, she was unable to do so, nor would his relatives tell her where he was though she inquired of them frequently. Consequently, even if desertion had been pleaded, he would hardly be in a position to claim that his wife deserted him, since clearly he remained away willingly and gave his wife no opportunity to seek his return even if she was partly to blame for his leaving. [Herold v. Herold, 47 N. J. Eq. 210, 213.]

The judgment should be reversed. It is so ordered. The other judges concur.

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NITA B. McCALL, Appellant, v. INTERNATIONAL LIFE INS. CO., Respondent.

Kansas City Court of Appeals, March 5, 1917.

1. **INSURANCE: Policy Loan: Non-payment of Premiums: Right to Reinstatement: Extended Insurance: Statute.** Insured's policies each contained a provision that "if there shall be an indebtedness to the company and if any premium shall not be paid on or before the date when due, an amount of insurance equal to the face amount of this contract less the indebtedness will automatically continue from said due date as insurance." They also provided for reinstatement by payment of all premiums where evidence of insurability was furnished. On policy loan agreements, which made the policies collateral, insured borrowed the full loan value of each policy and defaulted in the payment of premiums at a time when the indebtedness due exactly equalled the cash value. The company notified insured of this fact and suggested that he reinstate by paying the premiums and furnishing certificate of insurability. The insured offered to pay the premiums but refused to furnish the certificate of health and afterwards, without reinstatement or complying with the conditions necessary therefor, tendered the amount of the debt and demanded his policies. The tender was refused and insured died with matters in this shape. The policies were in harmony with and subject to the extended insurance statute which provided that after deducting from three-fourths of the net value of the policies the amount of indebtedness due the company, the balance should be taken as a basis for extended insurance: *Held*, that there was nothing on which extended insurance could be based, there being nothing in the policies or in the statute requiring the continuation of any further liability in the way of insurance; and that tender of payment of the debt did not give insured the right to extended insurance on the policies, nor was the company bound to reinstate insured until the conditions of reinstatement were complied with.

2. ———: **Default in Premiums: Extended Insurance: Estoppel.** Because insurer urged insured to reinstate after forfeiture, pursuant to rights contained in the policy and in accordance with the terms thereof, did not estop insurer from applying the net value of the policies to payment of the loans secured thereby, leaving nothing on which extended insurance could rest. Nor did the designation of the policies as "lapsed" have any effect in that way, since the meaning of the term was that the policies were in suspension so long as the insured had a right to exercise the privilege of reinstatement conferred by and contained in the policies.

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3. ———: **Policy Loans: Pledge.** Loan agreements, showing on their face that they were made subject to provisions of life policies that insured could borrow on the sole security of the insurance contracts and that they should be assigned as security according to terms of loan agreements, are not loan and pledge contracts distinct and independent from the policies, giving insured right to extended insurance by repayment of loan after default in paying premium.

4. ———: **Reserve Value: Loan Agreement: Settlement.** A provision in a loan agreement that, upon default in paying premiums on policy pledged, the loan if unpaid may be foreclosed by satisfying the indebtedness, the balance if any to be applied to purchase extended insurance, is a reasonable means of settlement and not contrary to public policy.

Appeal from Jackson Circuit Court.—*Hon. Daniel E. Bird,* Judge.

AFFIRMED.

McVey & Freet for appellant.

Humphrey, Boxley & Reeves for respondent.

TRIMBLE, J.—This action is upon two insurance policies issued May 9, 1907, by the Great Western Life Insurance Company upon the life of Charles A. McCall in favor of Nita B. McCall, then his wife and now his widow, and plaintiff in this suit. Said policies, numbered 63 and 64, were for $3000 and $2000 respectively. In November, 1912, the business of the Great Western was reinsured by the International Life Insurance Company, hence the suit is against the latter company, it having stepped into the shoes of the former.

The policies contain the same provisions and differ only in amount and in premiums, which, in each policy, was a stipulated sum payable annually on or before May 9, with thirty days grace, throughout insured's life. Hence, the issues, under both counts of the petition, are identical.

On March 30, 1912, and after paying six full annual premiums, insured borrowed on policy No. 63 its full loan value, to-wit, $183, and on policy No. 64

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its full loan value, to-wit, $122. On May 9, 1913, insured defaulted in the payment of the premiums due on that date. It is undisputed that on said date the indebtedness due from insured on the loan made to him on each policy exactly equalled the cash value of said policy, namely, $183 in one and $122 in the other. After defaulting in the payment of premiums no other premiums were paid by the insured. He died May 19, 1915. Suit was instituted on the policies August 17, 1915.

There is no question but that, if there had been no loan on each policy, three-fourths of the net value of each, computed as directed in section 6946, Revised Statutes 1909, would have been sufficient to have carried the policy, as extended insurance, beyond the date of insured's death. And in March, 1915, insured made a tender of, or sent to the Insurance Company, the full amount of said loans with interest, which the company declined to accept, and returned to the insured. If the defendant had accepted payment of said loans at that time, or, if it was required or bound to do so in law, then it is unquestioned that there was more than sufficient reserve value in each policy to carry the same beyond the date of insured's death. The controversy herein, therefore, grows out of the situation created by the existence of said loans, and the conduct of the insurer and insured with relation thereto *subsequent* to the insured's default in premiums on May 9, 1913. The position of the respective parties hereto may be stated thus:

Plaintiff's view is that when default occurred, notwithstanding the fact that on the date of the default in premiums the loan on each policy equalled the value thereof, so that deducting said debt from said value nothing remained on which extended insurance could rest, nevertheless, defendant did not deduct such debt nor apply the net value in payment thereof, nor attempt to do so, until after insured had tendered full payment of said debt with interest, and, therefore, defendant was bound to accept payment of said loan and must

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now accept payment thereof (which is re-tendered in the petition), leaving the net value unincumbered by said debt and free to operate for the benefit of insured and his beneficiary by carrying said policy as extended insurance to the date of insured's death. In other words, plaintiff claims that the loan on each policy created the relation of pledgor and pledgee between the insurer and insured, wholly independent of and distinct from the policy and the relationships and rights created thereunder, and that such relation of pledgor and pledgee continued with no foreclosure on the part of the pledgee, and hence the policies continued with insured's right to extended insurance thereon, but subject to the lien of said pledge which insured, by his tender of the debt and plaintiff's renewal thereof, has removed, leaving plaintiff entitled to recover on the policies as extended insurance.

On the other hand, defendant's view is that since there was no value of the policies in excess of the loans thereon, there was no balance on which extended insurance could be based. Its contention is further that the relationships created by the loans were not independent of those created by the policies but are closely interwoven therewith and dependent thereon and must be so treated when considering the present rights of the parties. The defendant also contends that it did apply the net value of the policies to the payment of insured's debt and notified him of such action and that he acquiesced therein, but long afterwards attempted to create different rights for himself by making a tender of th debt, at the same time refusing to re-establish the policy by making the required showing as to health and paying up the defaulted premiums.

At the conclusion of the trial the court instructed the jury to find for defendant, which was done. Judgment being thereupon rendered in defendant's favor, the plaintiff appealed.

Prior to the amendment of 1903 (Laws 1903, p. 208), our non-forfeiture statutes, section 6946, Revised

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Statutes 1909, allowed only notes given for past premiums to be deducted from three-fourths of the net value of a policy leaving the remainder of such value as a basis for extended insurance. [Sec. 7897, R. S. 1899; Gillen v. New York Life Ins. Co., 178 Mo. App. 89; Smith v. Mutual Benefit Life Ins. Co., 173 Mo. 329; Christensen v. New York Life Insurance Co., 160 Mo. App. 486; Paschedag v. Metropolitan Life Ins. Co., 155 Mo. App. 185, 198.] But the 1903 amendment changed this and allowed *any indebtedness* due the company to be deducted. [Paschedag v. Metropolitan Life Ins. Co., supra; Burridge v. New York Life Ins. Co., 211 Mo. 158, 173.]

Each of the policies contained a provision that:

"In case of default in the payment of any premium or interest the company will reinstate the contract at any time, if not previously surrendered for its cash value, upon written application by the insured to the company at its Home Office with evidence of insurability satisfactory to the company, payment of all premiums that would have been paid in the intervening time if no default had been made, with interest thereon at the rate of five per cent. per annum computed from the premium due date, and payment of reinstatement, with interest at like rate, or any indebtedness existing at the time of default."

They further provided that:

"On demand in writing to the Home Office of the Company, the insured may borrow on the sole security of this contract the amount specified in the accompanying table for the year in which the loan is to be taken, subject to interest in advance, at the rate of five per cent per annum, provided the contract shall have been in force two years; the contract shall be assigned to the company as security according to the terms of the company's loan agreement, and the premiums on the contract shall be paid in full to the anniversary of the insurance next succeeding the date when the loan shall be made."

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The policies each contained the following further provisions:

"If any premium shall not be paid on or before the date when due, and if there be no indebtedness to the company, the insurance will automatically continue from said due date as term insurance during the term, including the period of grace, specified in column 4 of the accompanying table; or in lieu of such term insurance, the company will indorse on this contract the amount of paid-up insurance, if any, specified in column 3 of the accompanying table, upon written request therefore made by the insured within said six months from said due date. Upon similar written request within said six months, and surrender of the contract the company will pay the cash value, if any, specified in column 2 of the accompanying table."

. . . . . .

"If there shall be an indebtedness to the company, and if any premium shall not be paid on or before the date when due, an amount of insurance, equal to the face amount of this contract less the indebtedness, will automatically continue from said due date as term insurance, for the term, including the period of grace, which the excess of the cash value of the contract, if any, over the indebtedness, will purchase at the then age of the insured, according to the company's present table of single premiums. In lieu of such term insurance, provided the insured shall make written request therefor within six months from said due date, the company will, as the insured may elect, either indorse on this contract the amount of paid-up life insurance which said excess will purchase at the then age of the insured, according to the company's present table of single premiums, or upon surrender of the contract pay said excess in cash."

. . . . . .

"If any premium shall not be paid on or before the date when due, the liability of the company shall be only as hereinbefore provided."

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On March 30, 1912, the insured and the beneficiary signed a written application for a loan on each policy, and executed two "Policy Loan Agreements," one for $183 and the other for $122, which were delivered to the company along with the policies as collateral. Said "Policy Loan Agreements" were identical except in amount, so that only the material contents of one need be set forth. They recited that:

"Pursuant to the provisions of Policy No. (63 in one and 64 in the other), issued by the Great Western Life Insurance Company on the life of Charles A. McCall, the undersigned have this day obtained a cash loan from said company of the sum of (here $183 was specified in one and $122 in the other), the receipt of which is hereby acknowledged, conditioned upon pledging as collateral said policy with said company as sole security for said loan and giving assent to the terms of this Policy Agreement: therefore,

In consideration of the premises, the undersigned hereby agree as follows:

1. To pay said company interest on said loan at the rate of five per cent. per annum, payable in advance from this date to the next anniversary of said policy, and annually in advance on said anniversary and thereafter.

2. To pledge, and do hereby pledge, said policy as sole security for the payment of said loan and interest and herewith deposit said policy with said company at its Home Office.

3. To pay said company said sum when due with interest, reserving, however, the right to reclaim said policy by repayment of said loan with interest at any time before due, said repayment to cancel this agreement without further action.

4. That said loan shall become due and payable—

(a) Either if any premium on said policy or any interest on said loan is not paid on the date when due, in which event said pledge shall, without demand or notice of any kind, every demand and notice being

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hereby waived, be foreclosed by satisfying said loan in the manner provided in said policy.

(b) Or, (1) on the maturity of the policy as a death-claim or an endowment; (2) on the surrender of the policy for a cash value; (3) on the selection of a discontinuing option at the end of any dividend period. In any such event the amount due on said loan shall be deducted from the sum to be paid or allowed under said policy."

It will be observed that the policies were issued in 1907, after the amendment of 1903 was made, and hence the policies are subject to the law as it now stands, which says that "after deducting from three-fourths of such net value . . . any evidence of indebtedness to the company . . . *the balance shall be taken as a net single premium* for" the insurance therein provided for, which is, for brevity, termed extended insurance. In other words, the statute requires that, of the three-fourths net value of the policy, *whatever balance there is,* in excess of any indebtedness due the company, shall be considered and taken to be a net single premium for the extended insurance. It would seem that *if there was no balance*, there would be nothing on which extended insurance could rest, and hence nothing in the law compelling extended insurance where that is the situation.

When we turn from the requirements of the *law* to the terms of the *policy,* we find that its provisions are in harmony with and not in conflict with the law. It provides: 1. That upon default in premiums, and there is *no* indebtedness to the company, extended insurance *automatically* continues, thus giving to insured the same benefits which section 6946 enforces (and perhaps greater benefits since the policy does not require three annual payments to be made, as does the statute); or, if insured wants a paid-up policy, in lieu of extended insurance, he will be given that, as enforced by section 6947; or, the company will pay the cash surrender value as provided for in section 6949, Revised Statutes 1909. 2. If there *is* an indebtedness to the company

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when default is made in payment of premiums, then extended insurance *automatically continues* for the term which the *excess* of the cash value of the policy *over the indebtedness* would purchase. Provision also was made for paid-up insurance or for a surrender at its cash value at the election of the insured. It being conceded that at the time of default in the premiums the indebtedness equalled the value of the policies and consequently there was no excess in value above the indebtedness, we fail to see anything either in the statute or in the policies requiring the continuation of any further liability in the shape of extended insurance.

Is there anything in the facts or in the conduct of the company, at the time of and subsequent to the default in the payment of premiums, that *compels* the company to grant extended insurance or which prevents it from applying the indebtedness to the extinguishment of the debt leaving nothing of value in the policy on which extended insurance could rest? Or could the insured, by tendering the amount of the debt in February, 1915, while still in default of premiums and refusing to give a health certificate, *compel* the company to accept payment of the indebtedness *in cash* instead of treating said indebtedness as being liquidated by the net value of the policies?

It would seem that if there is nothing in the law, nor in the wording of the contracts between them, to compel the company to grant extended insurance, or to accept cash rather than the value of the policies after a default in the premiums, then there is no reason why plaintiff is entitled to say that the company must do so now; unless indeed, the company by its conduct *misled* the insured to his disadvantage whereby it is estopped from standing upon its rights. However, there is no evidence of this and no pleading of estoppel.

It seems that after default was made in the payment of the premiums due May 9, 1913, and after the expiration of the thirty days of grace allowed therefor, the company, by letter dated June 19, 1913, notified

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insured of that fact, and informed him the policies had "elapsed" on that account, but that if he would send a certain sum together *with a certificate showing he was in good health* (blank for which was inclosed), the company would consider revival of policies at once and arrange for an extension of four months on the balance due on the premiums. On June 25, 1913, insured wrote the company saying, "I do not know what standing I have, if any, with your company now" and directing it, if the insurance had not lapsed, to apply inclosed check, and two notes therein referred to as having been sent the week before, to payment of premiums; but if the policies had lapsed to return the check and notes. The insured, however, did not send any health certificate. The company on June 27, 1913, wrote saying the notes had come but the check had not, but that, in view of the fact that the insurance had lapsed because of default in the payment of the premiums when due, it was necessary for insured to furnish a medical health certificate (blank for which was inclosed) before the company could consider the question of reinstatement. On July 2, 1913, the company wrote insured saying the check had come but that undoubtedly by this time insured had received the company's letter of June 27, so that if he would send the Medical Health Certificate duly executed before some reputable physician of his place, they could then consider the reinstatement of his insurance. The letter went on to say that since the premiums were not received during the Grace Period, the policies stood as lapsed on the records, but the company hoped he would not allow them to remain thus, and that consequently the company expected to receive the Health Certificate so that, if it was found satisfactory to the Medical Department, reinstatement could be duly effected, and that in the meantime his remittance and notes for the defaulted premium would be simply held subject to his order.

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July 11, 1913, insured wrote to the company saying he had not intended to let his policies lapse but that as they were now in that condition he would rearrange his insurance. He then requested that the company return the check and notes sent to cover the defaulted premiums, and to cancel the loans on the policies and return to him the papers he should have. To this letter, the company, on July 18, 1913, replied urging him not to give up the idea of reinstatement and not to allow the policies to remain in their present condition, "as the *cash loan* that you have realized on each *is equivalent to the cash value at the present time, which would not return you, therefore, anything as a termination cash value.*" The letter then went on to give reasons why insured should reinstate himself, and closed by urging him to furnish the Health Certificate (blank for which was enclosed), and agreeing to pay the physician's compensation therefor so that he would be at no expense for renewal. Insured made no attempt to furnish the Health Certificate or at least did not do so, but on July 25, 1913, wrote the company to "kindly return the articles requested by me in my last communication without further delay." Again, on August 7, 1913, insured wrote the company saying he had written for the return of the draft and two notes sent to cover defaulted premiums, but had heard nothing from the company. The company answered by inclosing to him the check and two notes sent to cover defaulted premiums; but said that it did not believe he could afford to reach a hasty decision in the matter, and suggested that he reconsider his decision, and that the company would be glad to hear from him at any time in regard to reinstatement and that the company could not be regarded as being unjust in requiring insured to furnish evidence of insurability satisfactory to the company in connection with revival, especially as the insurance lapsed through no fault of the company.

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Nothing further was heard from insured until December 16, 1913, when he wrote the compny referring to his two policies as having "lapsed last May" and mentioning the loans thereon, and saying that he had asked for the papers evidencing the loan and bearing his and his wife's signature, but they had never been sent to him. He closed by asking for the return of the papers at once. To this letter, the company, on December 22, 1913, answered, referring to the policies as having "expired on account of your failure to meet your May 9, 1913, deposit under each," and saying the company could not return the papers executed for the outstanding loans under the policies because those papers were the only evidence the company had in its possession that the loans were made, "and were we not to hold your policies with the Loan Agreements, there would be nothing to indicate that you would not be entitled to a Cash Value, Automatic Extended Insurance Value, or Paid-up Value at this time." The letter closed by saying that after he had thought over the matter he would understand "the company's position in this matter and why it is absolutely essential that they hold these policy loan agreements in their possession for the reasons assigned."

Insured made no reply to this letter and nothing further was heard from him for more than a year thereafter or until February 25, 1915, when he sent a telegram asking the company to advise him by wire the amount of loan against the policies. The company immediately wired back that there was $183 on Policy 63 and $122 on Policy 64. Thereupon, at some time between February 25, and March 1, 1915, insured sent a draft for $305 to pay same and asked that the policies be returned to him at Manhattan, Kansas.

To this, the company, on March 1, 1915, replied that they could not apply the remittance to the payment of the loan as the policies were in a lapsed condition. The letter suggested that insured sign new

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loan agreements for $140.42 and $207.57 and revive the policies by applying the cash he had sent whereby his premiums would then be paid to May 9, 1916. The letter went on to say that before reinstatement could be considered it was necessary for insured to furnish a medical health certificate (blank for which was enclosed). The letter then urged insured to take the steps necessary for reinstatement by submitting the health certificate and executing the new loan agreements, so that, if the health certificate was satisfactory to the Medical Department, the policies could be reinstated. Blanks for the new loan agreements were also inclosed, and the letter ended by saying that it "must be understood that our offer of premium loan settlement does in no way waive the forfeiture provision of your policy and if the policies are to be reinstated the above requirements must be complied with." Thereupon, on March 3, 1915, insured wrote the company saying: "I have no desire to reinstate the policies at this time, but desire to take advantage of clause 4 of loan agreement and repay the loan on the policies." The letter then inclosed a draft for $17.40 to cover interest on the indebtedness and asked that the policies be returned. To this, the company, on March 9, 1915, wrote saying:

"Under the terms of your policy the loan if unpaid at the time the next succeeding premium is due is liquidated by the Cash Value and the policy remains entirely out of force until either the satisfactory medical health certificate is furnished and back premiums together with interest is paid up, so we could not accept your money to pay off this loan at the present time."

The letter then suggested another method by which, with the money he had sent, he could obtain insurance for a term of four years or more, and inclosed a contract to that effect for him to look over, at the same time telling him he must furnish satisfactory health certificate and that if he was in bad health it would be useless to have himself examined. The letter closed

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by saying the company held his remittance subject to his order and awaited his further communication. Again, on March 23, 1915, the company wrote asking whether insured would not accept their offer of a five year term contract by sending in his application therefor together with satisfactory medical examination. The letter then said:

"We are holding in our office bank draft for $322.40 which you wished to use in liquidating old loan on policies of above numbers which have already lapsed. As previously advised we cannot apply this for the reason that loans on your policies were liquidated by the cash value of the old contracts which have expired. I am returning the bank drafts which you may have cancelled. If you decide to take the five year term contract as outlined in my letter of the 9th, kindly attach bank draft for $74.90 to your application."

On May 15, 1915, the company wrote another letter, evidently in answer to one insured had caused to be sent to it, for the company's letter says:

"We are just in receipt of a letter from Mr. Wilburt requesting information as to whether or not the Company would place your policies on extended insurance providing you paid off the loan. As previously advised this cannot be done unless the policy be reinstated, back premiums paid, and evidence of insurability furnished us. This proposition was made to you some time ago."

With matters standing thus, insured, as stated, died on May 19, 1915.

By the terms of the Loan Agreements, insured's indebtedness to the company was due on the same date the premiums were payable. Hence the indebtedness was due when insured defaulted in his premiums on May 9, 1913. Now, while there does not seem to have been any actual or physical cancellation of the loan agreements, yet it is clear that, from and after the default in premiums, the company treated the indebtedness and the net value of the policies as *balancing each*

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other on that date, and took the position that *unless* the policies were reinstated in accordance with the terms thereof there was no value in them. And this position was at once plainly stated to the insured. The policies provided that in case of default in premiums they would be *reinstated at any time,* if not previously surrendered for their cash value, provided application was made therefor *with satisfactory evidence of insurability* and the payment of all back premiums with interest at five per cent. *together with* interest at like rate on any indebtedness existing at time of default. Consequently, the company, in urging the insured to reinstate, was not waiving any rights it had under the law by reason of the non-payment of premiums. It was merely extending a privilege or right which the contract required it to give *provided* insured complied with the requirements necessary for reinstatement. And although, in the correspondence between them, the company urged insured to reinstate, yet it was clearly set forth that as long as the insured remained without reinstatement, the policies had no value. And after insured had, by his letter of July 11, 1913, indicated an intention to allow the policies to remain in that condition, the company, by its letter of July 18, 1913, urged him not to give up the idea of reinstatement because, if he did that, the indebtedness on the policies *equalled their value, leaving nothing in them for him.* This was *more than a year and a half* before he tendered payment of the loan. So that there can be no question but that the company clearly evinced its determination to use the net value of the policies in payment of the indebtedness and so treated the matter, unless insured would exercise his right of reinstatement granted by the policies. The insured declined to exercise that right, and, as the loan agreements provided that the policies might be regarded as "sole security" for the debt, the company had the right, after default was made in the premiums, to use the net value of the policies in payment of the debt, unless indeed the statute, or the terms of the insurance

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contracts forbade that right. But so far as the statute is concerned, it does not say that extended insurance shall be granted at all events, but only in case there remains any excess of value after any indebtedness is deducted; and so far as the policies are concerned, they say that, if there is *no* indebtedness, then extended insurance will continue automatically, but if there *is* indebtedness, then only such extended insurance will continue as is created by the value that is *in excess of the indebtedness.* There being nothing in the statute or in the policies to forbid the company from offsetting the debt with the value of the policies (the two being equal) and nothing in the company's conduct waiving its right to do so, or estopping it from so doing, it is not seen how insured, after defaulting in his premiums, can insist that the company shall forego its right to cover said indebtedness with said net value, or that insured's beneficiary can make such insistence now.

But plaintiff says the relation of pledgor and pledgee was created and that relation was never changed, and insured had the right to pay off his debt at any time even after default, and having offered to do so, plaintiff may do so at this time. This would be true if the loans were matters wholly separate and independent of the insurance contracts. But they are not. As said in Burridge v. New York Life Ins. Co., 211 Mo. 158, l. c. 174:

"The loan and pledge contract in the case at bar is in no fair sense a contract distinct and independent from the policy. To the contrary, such loan and pledge was contemplated by the policy itself. It involved the policy, it may be likened unto an egg laid in the policy and subsequently hatched—i. e., was made in pursuance of its terms."

The policies provided that the insured could borrow the loans on the sole security of the insurance contracts and that they should be assigned as security according to the terms of the loan agreements. And the loan agreements show on their face that they were

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made "pursuant to the provisions" of the policies, and that the loans were made and obtained "conditioned upon pledging as collateral said policy with said company as sole security for said loan and giving assent to the terms of this Policy Agreement," among which was the "right to reclaim said policy by repayment of said loan at any time *before due.*" The only provision for repayment of the loan, *after* default in premiums, appears in connection with insured's right of reinstatement of the policy and is the fourth and final condition necessary for that reinstatement. Hence, insured cannot exercise the right of repayment of the loan *after* default except in connection with reinstatement of the policy. And having agreed in all of the contracts that the company may treat the policy as sole security for the debt, insured was not entitled, after defaulting in his premiums, to compel the company to forego that right, unless he complied with the condition giving him the right to pay the loan then. In other words, insured, after default, *did not have the right of repayment without reinstatement.* The right he had was not one of repayment but of reinstatement And he chose not to exercise that right. There is nothing in that situation which is inconsistent with sound public policy or violative of the substantial rights of the insured. [Ruane v. Manhattan Life Ins. Co., 186 S. W. 1188, 1191.]

The insured forfeited nothing. He obtained a loan which equalled the net value of each policy at the date of his default, and, in so obtaining that loan, he lawfully contracted away any right he otherwise would have had to extended insurance either under the statute or under his policies. We say "lawfully" because the statute now allowes *any* indebtedness to the company to be considered before requiring any net value to be taken as a basis of extended insurance.

The policies by their terms automatically adjusted the rights between the insured and insurer, and the values thereof balanced and offset the indebtedness. Nothing remained upon which extended insurance could

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be based; and insured at one time acquiesced in the situation and did so for over a year and then tried to make a new contract inconsistent with the terms of the old, to which defendant would not agree.

We cannot see how the use of the word "lapsed" in the company's correspondence, could change the rights of the parties. If the word "lapsed" in insurance parlance means that the policies were "temporarily in suspension" that was true since, under the right of reinstatement *at any time* contained in the policies, they were subject to revival in that way and so could not be deemed wholly extinct so long as there was a chance of insured's exercising that right.

We are of the opinion that the plaintiff, under the conceded facts in the case, is not entitled to recover, and accordingly the action of the trial court, in peremptorily instructing the jury to return a verdict in favor of the defendant, is upheld and the judgment affirmed. The other judges concur.

NOVINGER BANK, Respondent, v. ST. LOUIS UNION TRUST CO., Appellant.

Kansas City Court of Appeals, March 5, 1917.

1. **EQUITY: Interpleader: Trustee in Mortgage.** The trustee in a mortgage to secure corporate bonds who has sold the property under the mortgage and has administered the fund promptly and with dispatch as far as it could, and holds the remainder of the fund, over which contention is made, as a mere disinterested stakeholder ready to pay it to whomsoever it belongs, but not knowing to whom it belongs, and against whom one suit is brought and others are threatened, has the right to seek protection of a court of equity and have the rival claimants interplead, unless something has occurred or exists which, clearly and upon the plainest principles of justice, puts the trustee outside the pale of an equity court's consideration.

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2. ———: ———: ———: **Partiality.** Evidence considered and *held* not to disclose partiality on part of a trustee. The fact that he failed to notice that one of a number of bonds was not in controversy and did not pay it over to the party entitled thereto but offered to pay the whole amount into court should not deprive him of the benefit of a court of equity since no harm has resulted to any one and the court can order the one uncontested bond to be paid over to the party entitled thereto and the interpleader had over the rest.

3. ———: ———: **Bill: Sufficiency: Need Not State Rival Claims.** A bill for interpleader need not state the facts upon which the rival claimants to the fund depend with the same particularity required of the claims when they file their plea, but it is sufficient if the bill states the respective claims in such a way as to show that there is ground for them, and a reasonable doubt as to where the money should go.

4. ———: ———: **Amount to be Paid into Court.** Where all of the other bondholders, in settling with the trustee on the distribution of the proceeds of the foreclosure sale, reserved the question of their right to the distributive share of bonds held by a bank, the validity of which was questioned, the trustee is justified in paying into court the entire sum, though only part of the other bondholders had formally notified him that they questioned the validity of the bonds in dispute.

5. ———: ———: ———: **Privity of Title.** All holders of bonds secured by a mortgage on corporate property assert a right to the fund resulting from a foreclosure sale, which comes from the same source, and therefore can be required to interplead as to their rights to the fund, though there is no privity in the title of the respective parties to the bonds held by them.

6. ———: ———: ———: **Defenses: Dispute Over Amount: Interest in Fund.** A real dispute between the party seeking interpleader and those claiming the funds, is fatal to the right to have the claimants interplead. But the right to interpleader cannot be defeated by an unfounded assertion that there is more due from the trustee than is admitted by him and therefore an answer by way of cross-bill for interpleader, which alleges that the plaintiff in his complaint claimed more than was due, not in good faith, but solely to defeat defendant's right to an interpeader, is not demurrable. And a trustee under a mortgage securing corporate bonds does not, by paying the expenses of the sale, including the amount of the trustee's commission as fixed by statute, retain an interest in the fund which defeats his right to have the claimants thereto interplead.

Appeal from Adair Circuit Court.—*Hon. C. D. Stewart,* Judge.

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REVERSED AND REMANDED.

Campbell & Ellison for appellant.

Highbie & Mills for respondent.

TRIMBLE, J.—The Rombauer Coal Company executed a mortgage upon its coal mine and plant to the defendant, The St. Louis Union Trust Company, as Trustee, to secure 200 bonds of $500 each, payable to bearer, and due March 1, 1916. Upon default in the payment of any interest or of any of the principal of any of said bonds, the trustee was authorized by said mortgage to sell the mortgaged property at foreclosure sale, after notice, at the court-house door, in the usual manner of such sales (except that the sale might be conducted by any agent appointed by the St. Louis Union Trust Company), and upon such sale, after paying the costs and expenses of executing the trust, it was the duty of said trustee to apply the proceeds of such sale equally to the payment of all the bonds then outstanding and owned by said company.

The Coal Company defaulted in the payment of its bonds, and on the 6th of July, 1914, the Trustee in the mortgage, through its agent Orr, defendant herein, sold said property at foreclosure sale for $32,000.

On the same day, and within a few hours after the sale and before the purchase money had come into the trustee's hands and before the distributive share of each bondholder could be ascertained, plaintiff, as the holder of nine of said bonds, brought this suit against defendants to recover the sum of $1440 with interest and costs, as its distributive share. It will be observed that $1440 is the precise amount to which the holder of nine bonds would have been entitled if the entire $32,000 was to be distributed instead of the net amount left after deducting the trustee's commissions and the expenses of sale.

Immediately upon receipt of the purchase price of $32,000, the trustee added thereto the sum of $688

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in the sinking fund in its hands (presumably created under and by the terms of the mortgage), making a total sum of $32,688, which, after deducting $500.70 expenses of sale, left $32,187.50 for distribution among the holders of the outstanding bonds.

Thereupon the trustee made a statement of its accounts showing that the nine bonds claimed by plaintiff were entitled to a payment of $1451.52, which, as will be observed, is $11.52 more than the amount claimed by plaintiff in its suit as then standing. Before any distribution could be made, the other bondholders, namely, R. E. Rombauer holder of seventy-four bonds of the face value of $37,000, the Goodman Manufacturing Company holder of thirty bonds of the face value of $15,000, and the German Savings Institution holder of forty bonds of the face value of $20,000, notified the trustee that plaintiff was not entitled to any distributive share on $2500 of the bonds held by it because they were issued in violation of section 8, article 12, of the Missouri Constitution which provides that no corporation shall issue stock or bonds, except for money paid, labor done or property actually received and for no other consideration whatever; and that $1500 more of the bonds claimed by plaintiff were held by it in violation of its agreement with the Rombauer Coal Company without color of title thereto.

Thereupon the trustee filed an answer to plaintiff's petition setting up the foregoing facts, and stating that it had in its hands $1451.52, or $11.52 more than plaintiff was seeking, for distribution on said nine bonds; that it could not pay said amount to plaintiff without incurring liability to the other claimants, and asked that it be allowed to pay said sum into court and the rival claimants be required to interplead therefor.

Plaintiff demurred to this answer and was sustained, but immediately thereafter filed an amended petition against defendants to recover its distributive share on said nine bonds claimed by it, alleging, however, that, in addition to the $32,000 received as the

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purchase price of the mortgaged property, defendants "had and still have in their hands the further sum of $1000" making a total of $33,000 for distribution ratably on plaintiff's said bonds, out of which plaintiff prayed that it have and receive $1485 together with interest and costs.

To this amended petition filed by plaintiff, the defendant, St. Louis Union Trust Company, filed an answer and bill of interpleader in which it set up the same facts hereinbefore stated as being contained in its former answer. It further set up that it had exhibited its accounts as trustee to all the bondholders of the Rombauer Coal Company, who found the same to be just and true, and that bondholders to the amount of $95,500 (which was all of the bonds except $4500, or the nine bonds claimed by plaintiff), had settled with the defendant as trustee leaving, however, the question as to what amount plaintiff was entitled to under its claim to the nine bonds subject to further determination; that upon a trial of the case it would appear from the undisputed evidence that the total amount received by said defendant from all assets of the mortgagor was $32,688, and that the total net sum for distribution was $32,187.30, and that there could be no dispute as to the amount received for distribution since its correctness was admitted by all of the bondholders including the plaintiff; that the allegation in plaintiff's amended petition that the trustee had received $1000 in addition to the $32,000, making a total of $33,000 for distribution, was not made in good faith but for the sole and only purpose of making it appear that there is a dispute as to the amount of money in said defendant's hands for distribution, and only for the purpose of depriving defendant of its right to file a bill of interpleader.

The answer and bill of interpleader further alleged that owing to the conflicting claims of the parties, as hereinbefore stated, the defendant trustee was in danger of being harrassed by suits of the various rival claimants of the funds in its hands. It, there-

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fore, prayed that it be permitted to pay said $1451.52 into court and the rival claimants be required to interplead therefor.

To this second answer and bill of interpleader the plaintiff demurred as before. The trial court sustained it and the trustee stood upon its answer and bill. Thereupon, the court rendered judgment for $1581.75, being not only for the full amount claimed by the plaintiff but also for nearly $100 interest, together with costs. The defendant trustee has appealed.

The demurrer to the answer and bill of interpleader admits all facts well pleaded therein. It is admitted, therefore, that the defendant Trust Company was trustee in a certain mortgage, that it was foreclosed and the property sold for a certain sum, that in a few hours after the sale and before any distribution could be made, plaintiff sued the trustee for a distributive share of the gross sum received for the property without allowing any deductions for trustee's commission (fixed by statute, sec. 2856, R. S. 1909), or expenses of sale; that the trustee was notified by certain bondholders not to pay plaintiff on the bonds claimed by it for the reasons hereinabove stated; that said trustee has settled with the other bondholders except as to whom should be paid the distributive share on the nine bonds claimed by plaintiff; that for such payment it has the sum of $1451.52 which it is desirous of paying to whomsoever is entitled thereto but cannot do so on account of the conflicting claims aforesaid; and that to protect itself from being harassed by numerous suits it asks to be allowed to pay the money into court and have the rival claimants interplead therefor. In other words, defendant is the trustee of a fund which it has administered promptly and with dispatch as far as it could, and it holds the remainder of the fund, over which the contention is made, as a mere disinterested stakeholder ready to pay it to whomsoever it belongs but not knowing to whom it should be paid, and consequently it seeks the protection of a court of equity. And this protection

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is sought after one suit has already been brought against it and it stands exposed to the hazard of still others. It would seem that, under these circumstances, the situation of the trustee would call for the interposition of a court of equity unless something has occurred or exists which, clearly and upon the plainest principles of justice, puts the trustee outside the pale of an equity court's consideration. As a trustee placed, through no fault of its own, in circumstances under which it has reasonable doubt as to the proper disposition of funds in its hands, it has a right for its own protection, to apply to a court of equity. [Hayden's Extrs. v. Marmaduke, 19 Mo. 403.] "A bill of interpleader is an invention of equity jurisprudence, and is designed to relieve a party who holds in trust a fund to which there are several claimants and who in good faith is in doubt, and has reasonable grounds to doubt, as to whom it should be paid." [Little v. St. Louis Union Trust Company, 187 Mo. 281, l. c. 298.] The facts in the case at bar, as to the situation of the trustee, are, in many respects, very similar to the case last cited.

But it is said the answer shows that the Trust Company is not an impartial and disinterested stakeholder. There is nothing in the facts stated which disclose interest or partiality. On the contrary, the facts show that the trustee has at all times performed its duties promptly and impartially and has been willing, from the first, to turn over the entire fund in its hand which was more than the plaintiff at first claimed even on the gross amount of the purchase price instead of the net amount left after the payment of expenses fixed and required to be paid by law. Plaintiff says that only eight of its nine bonds were questioned by the other claimants, and therefore it is entitled to its *pro rata* share on that one bond at least, and that, therefore, the trustee should have paid that share to it without question, and, since it has not done so, defendant is partial and loses its right to seek the aid of equity. But, defendant offered to pay the whole

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fund into court. The failure of the trustee to observe that perhaps one bond was not questioned, did not result in any harm to plaintiff or advantage to either the trustee or the rival claimants. If it appears that plaintiff's right to one bond was not questioned, the court could direct that the amount due on it be at once paid to plaintiff and that the different claimants interplead for the remainder. To deny the trustee the refuge afforded by a court of equity merely because of this fact, which could result in no possible harm to anyone, would indeed sacrifice defendant's equitable rights to the most attenuated technicality.

It is claimed that the answer is bad on demurrer because the grounds upon which the other claimants object to the plaintiff receiving a distributive share upon the bonds it holds are not stated with greater particularity; that, as stated, they are mere conclusions of law and tender no issue. But it is not necessary for the one praying for an order of interpleader to state the facts upon which the rival claimants depend, with the same particularity required of the claimants when they file their interplea. All that is necessary in this regard is that the bill of interpleader shall state the respective claims in such way as to show that there is some ground for their contention and a reasonable doubt as to whom the money shall go. [Robards v. Clayton, 49 Mo. App. 611.] When it appears that there is a substantial doubt or hazard of payment, this is sufficient. [Smith v. Grand Lodge A. O. U. W., 124 Mo. App. 181, l. c. 201; Woodmen of the world v. Wood, 100 Mo. App. 655.]

It is further urged that as the holders of only 144 of the bonds have claimed a right to the fund, and the holders of the other fourty-eight, (being the remainder of the 200 except plaintiff's nine), have not asserted any claim to plaintiff's nine bonds, therefore the proportion which might have been, but was not, claimed by the holders of the forty-eight bonds should have been paid to plaintiff in addition to the amount due on the one bond hereinbefore mentioned. What has been said

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with reference to the failure to pay the amount due on the one bond applies to this point as well. Besides, in the bill of interpleader, it appears that all of the bondholders, other than plaintiff, in their settlement with the trustee, reserved the question of the validity of plaintiff's right to payment on said nine bonds; and, consequently, the holders of the other forty-eight bonds may, at any due and proper time, assert their right to a share in the fund, if plaintiff's rights should prove to be invalid.

We do not understand plaintiff's point that there is no privity of rights or of contract between the parties, and that the claims to the fund in dispute are not dependent or derived from a common source. It is true the various claimants do not assert their right to a share in the fund through any claim of title to the *bonds* plaintiff claims to own. They assert their right to the *fund* in the trustee's hands, which fund was derived from a sale of property in foreclosure of a mortgage. That fund belongs to the owners and holders of those bonds which had been legally issued and had become valid obligations of the mortgagor and liens on the property. If the bonds claimed by plaintiff never became valid obligations, then the fund in question belongs to those bondholders whose bonds are valid, up to the extent of their claims. Hence all claimants assert a right to the same fund and their respective titles come from the same common source. It is not indispensable that the identity of the thing claimed shall be absolute and perfect throughout. [11 Ency. of Pl. and Pr. 454.]

The most important point raised by plaintiff is that there is a dispute between plaintiff and the trustee as to the amount of the fund. The rule is well settled that if there is a real dispute between the party seeking to obtain an order of interpleader and those claiming the fund, such dispute is fatal to the right to have the claimants interplead. But is there any real dispute here? The plaintiff in its original petition asks for its full proportionate share of the gross amount of

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the purchase price without regard to any expenses of sale which necessarily must be paid and which are fixed by law. The trustee answers that it has a greater amount in its hands that the plaintiff asserts, whereupon the plaintiff files an amended petition stating that the trustee received $32,000 as the purchase price of the property, and an additional $1,000 from elsewhere, without stating any facts to show where it came from or to explain its source. The trustee, in its second answer and bill of interpleader, says the allegation that it received $1000 is untrue and is not made in good faith but solely for the purpose of defeating defendant's right to an order of interpleader. If this allegation is well pleaded, then plaintiff's demurrer admits its truth, that is, admits that the apparent dispute is a mere sham and not a real dispute.

If a bill of interpleader can be defeated by merely *asserting* that the fund is larger in amount than that stated by the party seeking to obtain an order of interpleader then a court of equity is remarkably helpless and unable to ascertain whether the circumstances are such as call for its interposition. In such case the party seeking to obtain an order of interplea would either have to admit a larger amount than was really due from him or forego his right to the equity proceeding. And indeed if he did admit a larger amount than the true one in order to obtain his right, there would be nothing to prevent a plaintiff from amending and *asserting* a still larger amount and so on since there is no limit to voluntary amendments.

But we are of the opinion that a court of equity is not so hampered in its duty to ascertain whether its jurisdiction should or should not be exercised. When a bill of interpleader is filed it calls for at least one and perhaps two litigations. [Roselle v. Farmer's Bank of Norborne, 119 Mo. 84, l. c. 92.] The first is between the party seeking the order of interpleader and the one opposing it. If the circumstances are such that the prayer of the bill of interpleader should be

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granted except on account of a dispute as to a fact governing and determining whether such right should be granted, then the court should ascertain whether such dispute is real or feigned. Otherwise, the court would have no means of ascertaining whether its equity powers should be exercised or not. We are of the opinion that under circumstances like the present, where it is alleged that the plaintiff's claim, that the amount of the fund is larger than that stated by the trustee, is not made in good faith but solely to defeat the right to an order of interpleader, the court should investigate the facts far enough to ascertain whether such claim was made in good faith or not, or had a reasonable foundation for its basis.

We do not understand that the trustee claims an interest in the subject of the controversy. The only subject of controversy in which either the plaintiff or the other bondholders can claim an interest is the fund remaining after the expenses of the sale have been paid. The law provides for these expenses, and no sale could be had if expenses were not incurred and paid. So that when the trustee paid these legal expenses this was not retaining an interest in the fund in which plaintiff or the other bondholders could have a right to participate.

The trustee in this case seems to have acted fairly, punctually and with due consideration for the rights of all. Through no fault of its own it has been placed in a position where it has a right to seek the aid of a court of equity or at least to have that court ascertain whether there is in fact any real ground for closing its ears against the prayer of the bill. If a trustee who has foreclosed a mortgage and has funds in his hands to which there are rival claimants, and of whose rights he is in doubt, cannot come into a court of equity and obtain its aid and protection, then he is indeed in hard lines. And if his right to an order of interpleader can be defeated by a mere unexplained and unsupported assertion that the amount in his hands

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is larger than he asserts it to be, then trustees will be running very much greater risks and hazards than those to which they have heretofore been exposed.

The judgment is reversed and the cause remanded. The other judges concur.

MODERN WOODMEN OF AMERICA, Respondent, v. HARRY M. PATTERSON, Appellant, FRANK J. JOHNSTON, Respondent, Interpleader.

Kansas City Court of Appeals, April 2, 1917.

1. **BENEFICIARY: Dependent: Member's Death.** A beneficiary in a benefit certificate issued by a benefit society to the beneficiary as a "dependent" must be dependent at the time of the member's death.

2. ———: ———: **Stepson: Heir.** A stepson, twenty-five years old, physically strong, healthy and robust, able in every way mentally and physically to maintain and support himself is not a "dependent" on his stepfather so as to be a beneficiary in a life insurance benefit certificate where the by-laws of the association provide that a "dependent" may be made a beneficiary. In such case the deceased member's only son and heir, is entitled to insurance.

Appeal from Adair Circuit Court.—*Hon. C. D. Stewart*, Judge.

REVERSED AND REMANDED (*with directions*).

Hughes & Hughes for appellant.

Weatherby & Frank for respondent.

ELLISON, P. J.—Deceased Manton M. Patterson at the time of his death, was a member of the Modern Woodmen of America and held a benefit certificate of life insurance for $2000. The association admitted its

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obligation to pay the certificate but understanding that the only son of deceased and his stepson were each claiming the money, it asked, and they were required to interplead. The judgment in the trial court was for the stepson.

Deceased was married and had one child, Harry, by his first wife. They were divorced in 1902 while Harry (one of the interpleaders) was a child five years old and the mother retained his custody. In the same year of the divorce, deceased married a widow, Mrs. Johnston, who had a son Frank, then about eleven years old, who is the other interpleader. So the contest is between deceased's son, nineteen years old, and his stepson, six or seven years older. The benefit certificate was taken out during his second marriage and that wife was made the beneficiary. She died in 1916 and shortly thereafter, in April, 1916, at request of deceased the stepson was substituted as beneficiary, related to deceased "as a dependent," and then in the following July, 1916, deceased died.

The by-laws applicable to the controversy are as follows:

"Sec. 45. No payment shall be made upon any benefit certificate to any person who does not bear such relationship as wife, surviving child, legally adopted child, heir, blood relative, or person dependent upon, or member of the family of the member, at the time of his death."

"Sec. 46. In the event of the disqualification of the beneficiary under the provisions of section 45 hereof, and if the member has failed to have another beneficiary named, then the payment shall be made to the widow, if no widow, to his children, etc."

The contest comes down to the single question whether the stepson interpleader was a dependent on deceased in the sense of the certificate, for if he is not, then under the last of these by-laws deceased's own son (interpleader Harry) as his heir, must prevail. At the time of the marriage to his mother the stepson as above stated was eleven years old, but at deceased's death, he

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was twenty-five, strong, able bodied and in good health. For several years prior to his death deceased lived in different places in different States and in the meantime the interpleader stepson attended school of Osteopathy in Kirksville, Missouri. He testified that he worked for deceased a part of the time and received wages; but he also testified that after he was twenty-one years of age he looked to deceased for support and that deceased sent him money while at school. He admitted in his testimony that he was not claiming to be a dependent upon deceased on account of any mental or physical infirmity or from any lack of ability to make his own way and earn his own living, and that he considered himself fully able, mentally and physically, to maintain himself.

The evidence in interpleader Harry's behalf was that his mother was divorced from deceased for the latter's fault, that Harry was given in custody of his mother and she alone supported him up to the time he was sixteen when she was compelled to take him from school, since which time he had been at work earning a living.

In our opinion interpleader Johnston was not a dependent on deceased in the sense of the law. It is well settled that a stepfather is under no legal or moral obligation to support his stepson, and it is apparent from Johnston's own testimony that he was in point of fact, not dependent on him. He stated explicitly that there was no necessity that put him in dependence upon his stepfather. It is true that a legal obligation to support need not necessarily exist as a prerequisite to one being a dependent. [Keener v. Grand Lodge, 38 Mo. App. 543, 550.] But there must be, as the word implies, a dependence by the beneficiary upon the deceased member. [Grand Lodge v. Elsner, 26 Mo. App. 116; Brower v. Supreme Lodge, 87 Mo. App. 614; Western Com. Ass'n v. Tennant, 128 Mo. App. 541; Vaughn v. United Mechanics, 136 Mo. App. 362.] A character of dependence which does not exist in this case. [Morey v. Monk, 145 Ala. 301; Duvall v. Hunt, 34 Fla. 85, 100, 101; McCarthy v. N. E. Order of Protection, 153 Mass.

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314, 318; Hodnett v. Boston & Albany Ry., 156 Mass. 86.] And such beneficiary must be a dependent at the death of the member. [Order of Ry. Conductors v. Koster, 55 Mo. App. 186; Murphy v. Nowak, 223 Ill. 301, 310.]

We are satisfied that the testimony of interpleader Johnston himself shows him to have no valid claim. The fund should therefore go to the son as heir of deceased. The judgment is therefore reversed and cause remanded with directions to enter judgment for him. All concur.

HENRY C. SMITH, Appellant, ATCHISON, TOPEKA, & SANTA FE RY. CO., Respondent.

Kansas City Court of Appeals, April 2, 1917.

DAMAGES: Actual and Punitive: New Trial: Right of Trial Court to Interfere with Award of Punitive Damages. In an action for wrongful ejection of passenger from train, the jury awarded plaintiff $5 actual and $500 punitive damages. The trial court thought $100 punitive damages was sufficient and directed a remittitur of $400, and, upon refusal of plaintiff to comply, granted a new trial. Since the decision of the Supreme Court in State ex rel. v. Ellison, 268 Mo. 225, a trial judge has the same power to order a remittitur in an award of punitive damages as in one of compensatory damages; and following that case as "the last previous ruling" of the Supreme Court, and in obedience thereto, the act of the trial judge in disagreeing with the jury as to the amount to be awarded for punitive damages, and in granting a new trial on plaintiff's refusal to enter the required remittitur, is upheld even though the award made by the jury was not so large as to be outrageous or induce the belief that the jury acted from partiality, prejudice or other improper motive.

Appeal from Buchanan Circuit Court.—*Hon. C. H. Mayer*, Judge.

AFFIRMED.

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C. F. Strop for appellant.

Culver & Phillip for respondent.

TRIMBLE, J.—This is an action to recover damages for wrongful ejection of a passenger from one of defendant's trains. The verdict was of $5 actual and $500 punitive damages. The circuit court thought the punitive award excessive, and, on consideration of the motion for new trial, offered plaintiff the opportunity of remitting $400, in which event judgment would be entered for $5 actual and $100 exemplary damages. Plaintiff declined to make the remittitur, and the motion for new trial was sustained solely because the court regarded $500 as an excessive award of punitive damages. Thereupon the plaintiff appealed.

Defendant operated certain suburban gasoline motor cars on one of its branch railroads. Plaintiff boarded one of these passenger conveyances at Gower, Missouri, desiring to be transported as a passenger to St. Joseph, Missouri, a distance of twenty miles. He arrived at the station just as the train was leaving and did not have time to purchase a ticket. The lawful rate of fare was two cents a mile and according to that rate he tendered the conductor forty cents for the full distance he wished to go. The conductor refused to accept this amount and demanded sixty cents which would be three cents per mile. Plaintiff refused to pay this rate and the conductor, in the presence of the passengers, told him he would stop the car and put him off. Plaintiff would not pay more, and the conductor stopped the car, took plaintiff by the arm, led him to the door and put him off. After being put off he told the conductor he was a deputy sheriff and "would like to go on." The conductor replied, "I don't give a God damn who you are, you are off now," and would not take him. The car at this time was a half or three-quarters of a mile from the station. It was about 6:30 p. m. of August 14, 1913, a hot summer evening. Plaintiff had to walk back to the station

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where forty or forty-five minutes later he caught a Grand Island railroad train, operating over the same tracks, and came on to St. Joseph. Plaintiff suffered no illness or untoward physical effects from this. Plaintiff testified that the conductor did not strike him nor offer to do so; that he, the conductor, "got a little mad, not so very much, seemed a little out of humor;" that he was mad because plaintiff would not give him the sixty cents. When asked how the conductor indicated he was mad, plaintiff replied: "He just said I couldn't ride—I think he said, 'By God, you can't ride.'" He was not sure the conductor used the oath last mentioned, but was sure he swore, as hereinbefore stated, after plaintiff was off the car. There was no scuffle or tussle.

The evidence offered in behalf of the defendant as to what took place between the plaintiff and conductor does not differ greatly from plaintiff's version, except that the conductor denies using any oaths. The brakeman, who was at the rear of the car but who knew "there was some kind of trouble" and that the trouble was with plaintiff—though he did not know his name, and that the car was being stopped for the purpose of putting him off, went to them so that, if necessary, he could render such assistance as he thought proper. He either followed plaintiff off the car or preceded him. He says he doesn't think the conductor used the language plaintiff ascribed to him after he, plaintiff, was off the car on the ground, but admitted that there might have been some of the conversation he didn't hear. He would not say the conductor did not use it, but only that he did not hear it. Other evidence in behalf of defendant had obtained against the enforcement of the effect that the matter was carried on in ordinary conversational tones, neither seemed to be angry and no excited talk was indulged in so far as the witnesses (who were passengers in the car), heard. There is no question, however, but that the passengers fully understood that plaintiff was being put off the car because he would not pay the amount the conductor demanded.

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Some time prior to this the Supreme Court of the United States had dissolved the injunction which the defendant had obtained against the enforcement of the Two Cent Fare law, so that there was then not even apparent authority for the collection of more than two cents per mile. Plaintiff's demand for punitive damages, however, is clearly bottomed upon the *conductor's manner and conduct* towards plaintiff and not upon any malicious conduct of defendant *itself* in instructing its conductors to continue collecting three cents per mile after the Two Cent Fare Law had gone unrestrictedly into force. So that whether plaintiff made a case for punitive damages depends upon the manner and language used by the conductor toward plaintiff at the time of his ejection from the car. If the conductor used the language toward plaintiff which the latter says he did, there was a case for punitive damages in some amount at least. And it will be observed that the trial court, as well as the jury, found that plaintiff had made a case which permitted the allowance of such damages. In other words, both court and jury accepted plaintiff's version of the case. The only difference was that the jury thought the punitive damages should be fixed at $500 while the court thought $100 was sufficient.

The question, therefore, raised by plaintiff's appeal is as to whether the trial court, *having recognized that a case for punitive damages was made,* had the power to set aside the verdict for the sole reason that, in his opinion as a thirteenth juror, the award of punitive damages was greater than he thought it should be.

The appeal was first submitted to us at the October term, 1915, and an opinion by ELLISON, P. J., was handed down December 18, 1915. [See Smith v. Atchison T. & S. F. R. Co., 192 Mo. App. 210, 180 S. W. 1036.] This court entertained the view that in a case where punitive damages, under any view of the evidence was at all permissible, not only was it a question for the jury to say whether *any* such damages should be allowed, but that, if they were allowed, the *amount* thereof was a matter within the exclusive province of

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the jury, *subject* to the right of the court to set aside the award *only* in case it was so great as to appear outrageous, such that all reasonable men would unhesitatingly pronounce so unreasonable as to induce the belief that the jury, in making such an award, must have acted from partiality, prejudice, or other improper motive. It would seem that, up to that time at least, the authorities justified that view. In 3 Graham & Waterman on New Trials, 1135, it is said:

"According to the language, however, of adjudged cases, to justify the court in setting aside a verdict, the damages ought to appear outrageous, or manifestly to exceed the injury, and such that all mankind would at once pronounce unreasonable, and so as to induce the court to believe that the jury must have acted from prejudice or partiality, or were influenced by some improper considerations."

In the case of Sargent v. ————————, 5 Cowen, 106, 118, 119, the court denied the right of defendant to a new trial asked for on the ground that the award was excessive. The court said the damages "appear to be much larger than they should have been," but that they were not "so flagrantly outrageous and extravagant as necessarily to evince intemperance, passion, partiality or corruption on the part of the jury; and where that is not the case, the court will not undertake to set their judgment on a question of damages, in an action of this nature, in opposition to the judgment of the jury. It is the judgment of the jury, and not of the court which is to determine the damages."

In Coleman v. Southwick, 9 Johnson 45, 51, where plaintiff's verdict was attacked as excessive, Chancellor KENT said:

"The question of damages was within the proper and peculiar province of the jury. It rested in their sound discretion, under all the circumstances of the case, and unless the damages are so outrageous as to strike every one with the enormity and injustice of them, and so as to induce the court to believe that the jury

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must have acted from prejudice, partiality or corruption, we cannot, consistently with the precedents, interfere with the verdict. It is not enough to say, that in the opinion of the court, the damages are too high, and that we would have given much less. It is the judgment of the jury, and not the judgment of the court, which is to assess the damages in actions for personal torts and injuries."

And on page 52 of the same case, he said:

"The damages, therefore, must be so excessive as to strike mankind, at first blush, as being beyond all measure, unreasonable and outrageous, and such as manifestly show the jury to have been actuated by passion, partiality, prejudice, or corruption. In short the damages must be flagrantly outrageous and extravagant, or the court cannot undertake to draw the line; for they have no standard by which to ascertain the excess."

In Morgan v. Ross, 74 Mo. 318, 325, our own Supreme Court said:

"In vindictive actions, and so this action is now regarded, damages are given for the two-fold purpose of setting an example and of punishing the wrongdoer. It is believed that no case can be found in the books where the verdict in an action such as this has been set aside upon the sole ground of awarding excessive damages. Peculiar considerations exempt a verdict in an action of this nature from the interference of the court, when such interference is sought to be bottomed alone on the excess of the recovery. The amount of the damages in such cases is considered a question peculiarly within the province of the jury, and as one which cannot from the very nature of things be estimated or computed upon any mere compensative or pecuniary basis (Taylor v. Shelket, 66 Ind. 297); and courts certainly would not interfere with a verdict in this, or in kindred cases, where there is no scale whereby the damages can be graduated with certainty, unless proof be introduced showing flagrant abuse of those powers which the law

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had confided to the intelligence and good sense of the jury."

This was afterwards approved in Hartpence v. Rogers, 143 Mo. 623, 638.

It was, therefore, our view that inasmuch as both the trial court and the jury agreed that punitive damages should be awarded, the amount thereof as fixed by the jury was not subject to revision by the trial court *unless* the amount was so flagrantly outrageous and out of proportion to the facts presented in support thereof as to cause all reasonable and fair minded men to at once recognize the fact and say the jury must have been swayed by feelings and motives which were not proper and which unquestionably warped their judgment.

The case being one in which punitive damages were permissible, the question whether they should be allowed was exclusively for the jury *and not for the court.* [Carson v. Smith, 133 Mo. 606, 617; Nicholson v. Rogers, 129 Mo. 136, 141.] This being true, we were of the opinion that the survey made by the trial court in order to determine whether the verdict as to such damages should stand, *had to be confined to the evidence tending to support the award* and could not extend to the defendant's evidence in opposition thereto. Otherwise, the trial court would substitute *its* judgment for that of the jury, as to the allowance of punitive damages, merely because the judge accepted as true certain evidence of the defendant in opposition to such damages. But, in a case where, under any view of the evidence, punitive damages is at all permissible, the *jury alone* has the right to say whether they will be allowed or not. And, therefore, the trial court cannot say the jury's punitive award must not stand, merely because the court believed certain evidence which the jury by their verdict show they did not believe. The same is true with regard to disputed evidence offered by defendant in mitigation of such damages. For if the court, merely because *he* believes that some disputed evidence offered by defendant in defense or in

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mitigation of punitive damages is true, can say that the award thereof is too much, then he is substituting his judgment for that of the jury as to the *measure* of such damages. In all other kinds of damages the court gives instructions as to their measure, but as to punitive damages he is not allowed to *even hint* a measure. The jury are merely told under what circumstances they may allow them if they see fit, and the amount thereof is left to their honest, unbiased and impartial judgment.

As hereinbefore stated, there is practically no difference between the evidence of plaintiff and that of defendant as to what took place at the time of the ejection, except as to the matter of the conductor's cursing. The defendant further sought to establish the theory that plaintiff boarded the train and tendered his cash fare for the purpose of making a test case of the defendant's right to collect the three cents a mile the defendant was required its conductors to demand. This the plaintiff denied. As both court and jury agree that punitive damages should be allowed, they did not accept the defendant's contentions either as to the conductor's language and conduct or to plaintiff's alleged motive in getting on the car and failing to pay the sixty cents. But if plaintiff had such motive it was not an unlawful one, and did not justify the conductor in demanding, without authority of law, three cents per mile, and putting plaintiff off and using profane language in doing so. At most plaintiff's motive, if he had it, could only reduce the punitive damages. Though this might seem to relieve defendant of a part of its punishment for an unlawful act merely because the plaintiff, in a proper manner, asserted and stood upon his right. And even if the trial court, in passing upon the motion for new trial, thought plaintiff had such motive, and, on this account, thought the punitive damages were $400 too much, or even if he agreed wholly with the jury as to the facts, but thought that, under the circumstances, the plaintiff being an adult, a deputy sheriff, etc., $100 was enough punitive

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damages for wrongfully putting him off the train in the presence of others and subjecting him to this disagreeable and humiliating experience, and the necessity of walking the ties for half a mile back to the station on a hot August afternoon or evening, still this was a setting up of his judgment against that of the jury as to the *measure* of the punitive damages that should be awarded. And since the question of the *measure* of such damages was peculiarly with the jury, subject only to the requirement that they must not extend beyond the bounds of reason, we were of the opinion that only the evidence tending to support the verdict should be considered in determining whether it was so out of the bounds of reason as to justify the court in setting it aside. And since we did not think $500 could be said, as a matter of law, to be out of reason for the unlawful subjecting of a man, even a deputy sheriff, to such an experience, we were of the opinion that the court's action was unauthorized and not in harmony with the authorities then in existence. The trial court agreed with the jury in their conclusions on the weight of the evidence as to its calling for punitive damages, but disagreed with the jury as to the amount thereof, and set the verdict aside on that account. This court, therefore, reversed the judgment and remanded the cause with directions to reinstate the verdict, since, upon the facts found and *approved*, it was "too apparent to question that the verdict in this case was not so flagrantly and outrageously beyond the limits of reason as to force a conviction of passion, prejudice or corruption on the part of the jury." [192 Mo. App. 210, 180 S. W. 1038.]

On *certiorari*, however, the Supreme Court held (186 S. W. 1075) that it was difficult to see any reason for any distinction between the rule defining the power of a trial court over an award of punitive damages and one of compensatory damages, and that, on principle, the same rule requiring appellate courts to uphold the trial court in the granting of a new trial where there is any substantial evidence to support such action,

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"ought to and does apply" in a case where the new trial is granted upon an award of punitive damages as upon any other damages. The court then held that if upon the *whole case* there was any substantial evidence to support the action of the trial court, it should be upheld, and that since we did not consider the *whole* evidence to see whether there was some substantial basis for the court's action, we applied an erroneous test. Our judgment was then quashed. The Supreme Court was asked by defendant to render final judgment on the merits of the case but held that it was without jurisdiction to do so, citing Smith v. Atchison, etc., R. Co., 186 S. W. 1072, which holds that the Supreme Court has no such jurisdiction and cannot interfere with a judgment of the court of appeals unless the latter, in rendering its judgment, failed to follow the last previous ruling of the Supreme Court. The case was then sent back to us to consider anew, and, being now before us, we, in accordance with that mandate, proceed to do so.

Under the ruling now promulgated by the Supreme Court in said case of *certiorari* (186 S. W. 1075), we must scan the entire record, and, if there is any substantial evidence anywhere therein which, if accepted by the trial court as true, would justify him in thinking the award of punitive damages was greater than is warranted by the facts, then the action in granting a new trial must be upheld. On the undisputed facts and those established by the verdict of the jury, and *approved by the trial judge since he thought there should be punitive damages to the extent of $100,* we do not think it can be said, as matter of law, that $500 is excessive punitive damages for the wrongful and unauthorized putting of a man off a train under the circumstances disclosed.

If, however, notwithstanding the trial judge's recognition of the fact that punitive damages to the extent of $100 was proper, he could consider disputed evidence offered by defendant, namely, that plaintiff got on the car and tendered forty cents cash fare in

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order to have a case, and, believing that to be true, thought that under those circumstances, the experience and treatment plaintiff received did not warrant the imposition of punishment to the extent of $500, then the granting of the motion for a new trial may be proper. At any rate we so hold under the ruling of the Supreme Court. The judgment of the trial court is, therefore, affirmed. *Ellison, P. J.*, concurs in seperate opinion. *Bland, J.*, not sitting.

SEPARATE CONCURRING OPINION.

ELLISON, P. J.—If it be granted that the trial court, in passing on the motion for new trial had authority to look to the entire evidence in the case, that for defendant as well as that for plaintiff, in order to determine whether punitive damages were excessive, that does not touch the real question involved. The real question is whether the court or the jury measure punitive damages. Of course, if there is *no* substantial evidence to justify such damages, the court can so declare as a matter of law. And if there is evidence to sustain punitive damages, yet they are put so excessively high, or low, as to strike all reasonable persons as an outrage so as to show that the jury abandoned its functions as a solemn deliberative body, the court may interfere.

In this case the trial court refused defendant's demurrer, submitted punitive damages to the jury and sustained a verdict for such damages; the trouble being that it thereafter assumed authority to fix the *amount* of such damages. By reference to our opinion when the case was first here (192 Mo. App. 210, 180 S. W. 1036), it will be seen that we undertook to make plain, by reference to the Missouri cases and other authority, that it was the exclusive province of the jury to name the sum of a plaintiff's recovery, never to be interfered with by the court except in the instances just stated, where the amount was such as to demonstrate that the jury had abandoned the functions of jurymen and had

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shocked the moral sense. And we decided that five hundred dollars returned by the jury was not so large as to authorize the trial court, under the foregoing rules of law, to say that the jury had abandoned its proper function and committed an outrage against the moral sense. But the decision of the Supreme Court made in this case on *certiorari* is "the last previous ruling" and we, of course, should follow it as required by section 6, article 6, Amendment 1884 to the constitution.

CHARLES J. BRUNTMEYER, Respondent, v. SQUAW CREEK DRAINAGE DISTRICT NO. 1, Appellant.

Kansas City Court of Appeals, April 30, 1917.

DAMAGES: Drainage District: Governmental Agencies: Liability. Although drainage districts are governmental agencies to the extent at least that they have all the elements of corporations formed to accomplish a public use and purpose, yet they are not exactly like a county or a township, nor are they purely governmental agencies such as school districts. And where in the creation of a drainage district and its system of drainage, waters are collected and thrown in a body upon land adjacent to but outside of said district and no right to subject it to such overflow has ever been acquired in any way nor opportunity afforded for assessment of damages arising from the creation of said district, the district is liable for such damages. Otherwise such adjacent property is taken and destroyed without compensation in order that the district's public enterprise may be set on foot.

Appeal from Holt Circuit Court.—*Hon. Wm. C. Ellison*, Judge.

AFFIRMED.

T. C. Dungan and *Robert L. Minton* for appellant.

H. T. Alkire and *S. F. O'Fallon* for respondent.

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TRIMBLE, J.—The defendant is a Drainage District, organized in the year 1906, pursuant to sections 8251 *et seq.* of article 3, chapter 122, Revised Statutes 1899, as reenacted by the statute of April 8, 1905, Laws 1905, page 190. (With certain subsequent amendments made thereto, said laws now appear in the Revision of 1909 as section 5496 *et seq.*) Plaintiff, as the owner of a farm outside of said district, brought this suit in March, 1907, to recover damages for loss of his crop caused by an overflow of water thereon brought about by the system of dikes, ditches and drains constructed by said district for the drainage of the lands embraced therein. A verdict of $150 in plaintiff's favor was returned and defendant appealed to this court, where the case was submitted at the March term, 1911. Subsequently it was ordered transferred to the Supreme Court on the theory that a determination of the issues necessarily involved the construction of section 21 of article 2 of the Constitution which forbids the taking or damaging of private property for public use without just compensation. It seems, however, that a decision of the case does not involve the *construction,* but merely the *application,* of the Constitution. At any rate the Supreme Court on the 11th of December, 1916, retransferred the case, and it is now before us for disposition.

Some claim seems to be made by appellant that the evidence was insufficient to sustain the verdict, but even a casual examination of the record discloses substantial evidence to support the claim that the digging of the ditches and the creation of the dikes alongside, which the defendant caused to be constructed, in the creation of its system and plan of drainage of the lands within its boundaries, caused the waters complained of to be gathered up and thrown in a volume upon plaintiff's land to the injury and destruction of the crop growing thereon. There being substantial evidence to support the finding made by the jury and approved by the trial court, we cannot disturb the verdict on the theory that the evidence does not support

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it. [American Brewing Co. v. City of St. Louis, 209 Mo. 600; Bray v. Kremp, 113 Mo. 552; State v. Richardson, 117 Mo. 586.]

Error is claimed in the exclusion of evidence in the examination of one witness. Defendant was examining him concerning the water and the conditions on plaintiff's land, in the course of which the witness remarked he was attempting to go to Forest City at the time he saw the conditions he testified to. The court's action in excluding this was construed by counsel for defendant as excluding certain evidence he was intending in his own mind to bring out which would show that the water did not come from the source claimed by plaintiff. That counsel and court did not understand each other is clear, because the court in its rulings expressly said it would admit evidence showing where the water came from. Counsel did not state what the conditions were that he wanted to show on adjoining lands or that they were offered as tending to show where the water came from. It is clear that the court was not excluding any evidence which would tend to show the source of the water. This is shown not only by the rulings made by the court at the time, but also by the fact that everywhere else and throughout the trial defendant was allowed full opportunity to develop all the testimony that it now claims it was here prevented from showing.

The sole instruction asked by defendant (aside from the one in the nature of a demurrer to the evidence), was properly refused. The effect of the instruction was to tell the jury that even though the acts of the defendant *contributed* to plaintiff's injury yet unless they were the *sole* cause thereof plaintiff could not recover. This is not the law. The matter attempted to be covered by the instruction, had it been properly drawn, was fully covered by instructions given by the court on its own motion. So that even if the instruction had been faultless its refusal would not have been error. [Reno v. City of St. Joseph, 169 Mo. 642, 659; Bently v. Clarkson, 110 Mo. App. 1, 6.]

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Defendant's main contention is that even though the construction of its drainage system did result in injury and damage to plaintiff's land outside of and adjoining the district, still there is no liability on the part of the drainage district because it is a governmental agency, an arm of the State, and as such cannot be sued for the damage so caused by the creation of its drainage system.

In order to understand the precise question here presented, the exact nature of plaintiff's cause of action must be kept clearly in mind. This is not a suit for the unauthorized or negligent acts of the officers or agents of the district. But it is a suit wherein plaintiff alleges that in the creation of its drainage enterprise, defendant constructed its system of drains, dikes and ditches, and cut and intersected creeks and water courses, thereby turning and diverting the waters therein from their natural water course and from the natural drainage thereof, and, after collecting said waters, conducted them by means of said drains and ditches to a point or points near to plaintiff's land, which land was outside of said district, and there deposited them upon, or caused them to overflow, plaintiff's land to his injury and damage. In other words, the establishment of the district and its drainage system resulted in collecting the waters of creeks and other water courses, and also surface water, and casting them in a volume upon plaintiff's land which theretofore enjoyed its own natural drainage and was free from overflow. And plaintiff's land was outside of the district and no right to so subject it to such overflow had ever been acquired in any way, nor had opportunity ever been afforded for an assessment of damages to said land arising from the creation of said district. It would seem that if the drainage district is exempt from liability under such circumstances, then plaintiff's property has been taken and destroyed without compensation in order that the district's public enterprise may be set on foot. But this the above-mentioned section of the Constitution expressly forbids.

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It is true, the Supreme Court in Mound City etc. Co. v. Miller, 170 Mo. 240, in answering the contention that the law authorizing such drainage districts was unconstitutional, held that they were not mere private corporations but were public governmental agencies; that is, that they "have all the elements of corporations formed to accomplish a public use and purpose," and that the statute authorizing their creation was "not a law passed to accomplish exclusive and selfish private gain" and hence it did not come within the constitutional inhibitions invoked against it. And so it is also held in Squaw Creek Drainage District v. Turney, 235 Mo. 80, 90; In re Little River Drainage District, 236 Mo. 94; Morrison v. Morey, 146 Mo. 540. But these cases do not hold that if such a corporation is formed it may, in the creation of its system of drainage, destroy private property adjacent thereto without compensating the owners or rendering itself liable therefor. While a drainage district has the elements of a public corporation sufficient to meet the constitutional requirements with reference to the powers sought to be exercised, yet it is not exactly like a political subdivision of the State, as a county or township. Nor is it *purely* a governmental agency, such as a school district. A drainage district is organized by the landowners for the purpose of improving and reclaiming their lands, and this is the primary purpose though the incidental public good attained is sufficient to enable it to come within the limits set by the Constitution. Such districts are given the power of eminent domain and may condemn lands necessarily taken or damaged by the construction of its drainage system, but it is required to pay for all damages thus inflicted. The fact that the statute creating such district does not expressly say they may be sued does not prevent a suit *of the nature here involved,* for the Constitution will not allow them to take or damage private property without paying therefor.

It has been held in a number of cases in other States that such districts, being public corporations and

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governmental agencies, were not liable for the negligent or tortious acts of its officers. And in some of the earlier cases the doctrine was announced that the district was not liable for *any* damage done even though the mere creation of the drainage plan damaged private property. Among these appears the case of Elmore v. Drainage Commissioners, 135 Ill. 269. But in that case, although the court seems to go to the length above indicated, the plaintiff's land was *inside* the district, and he, therefore, not only had had an opportunity of having his damages assessed but it was presumed that he was fully compensated for all damages consequent upon the construction of the drainage system.

In the later case of Bradbury v. Vandalia Drainage District, 236 Ill. 36, 45, the same court held that it was quite evident that the doctrine of the Elmore case needed some revision or limitation. The nature of the case at bar is precisely like the one in the Bradbury case as will be seen by noting the language of the court on page 43 where it is said:

"It is first to be observed that in this case it is not necessary to the maintenance of the action that the corporation or its officers should have been guilty of either wrong or negligence. The first and third counts aver that the scheme of the improvement as fixed by the decree of the county court included the construction of the levee, which was erected in accordance with said decree. Under those counts the damage resulted, not from negligence or improper construction, but from the adoption of the plan of drainage to benefit the lands within the district; and in Stout v. McAdams, supra, which was an action on the case, it was held that although the act of one person may be in itself lawful, yet if in its consequences it necessarily damages the property of another, the party occasioning the damage is liable to make reparation commensurate to the injury he has caused."

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Continuing afterwards upon the question of whether a drainage district should be held liable for damage thus created, the court says on page 44:

"Lands taken or damaged by a drainage district for its purposes are taken or damaged for a public use, and compensation must be made therefor. [Wabash Railroad Co. v. Coon Run Drainage and Levee District. 194 Ill. 310;. Juvinall v. Jamesburg Drainage District 204 Id. 106.] If a drainage district actually takes land, compensation must be made before the land is appropriated, and if the district concedes that damage will result to lands such damages may be assessed under the law of eminent domain; but if the district does not concede, in the first instance, that damage will result, an action on the case is an appropriate remedy to determine the question whether lands will be damaged and to recover the damages. Under the Constitution private property cannot be taken or damaged for a public use without just compensation, and this gives a right of action."

The court calls attention to the fact that drainage districts do not occupy exactly the same place as other corporations which are purely political or civil divisions of the State. The State is not divided into drainage districts nor do they have public or governmental duties thrust upon them without their consent. A district is organized by the landowners in the district and the lands are assessed to pay the whole costs on the theory that they alone are benefited. And then the court goes on to say:

"Undoubtedly a drainage district is not liable for the unauthorized acts of its commissioners for which they are personally liable, but the district is clothed with the power of eminent domain for the purposes of its organization and is prohibited by the Constitution from taking or damaging lands without making compensation therefor. If no means were furnished with which to pay such damages that fact would furnish no authority for causing such damage, and the obvious re-

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sult would be that acts causing damage to others could not be performed at all."

We think this applies to the case at bar. The plaintiff's land is not inside the district and it was formed without affording him an opportunity to have his damages assessed and compensation given for the damages accruing to him, not through some negligent or unauthorized act of an agent of the district, but through the very creation and establishment of the district itself. If the district can do this and collect its surface water into one volume and divert natural water courses so that the lands in the district are drained at the expense of plaintiff, then his property has been taken and damaged to benefit the lands in the district, and that without compensation in any way.

We are unwilling to lend our sanction to the doctrine that the district is immune under such circumstances. The judgment is, therefore, affirmed. All concur.

JOSEPH S. MAUGHIMAN, et al., Respondents, v. NATIONAL BEN-FRANKLIN INS. CO., Appellant.

Kansas City Court of Appeals, April 30, 1917.

1. **INSURANCE: Inspection of Property after Fire.** The provision in an insurance policy allowing insurer an inspection of the insured property remaining after the fire is a reasonable one for the protection of the insurer, and the right cannot be denied even though the damage was to furniture by water and falling plaster and the furniture has been dried and cleaned so that the furniture will not appear to be so badly damages as it would if examined immediately after the fire. In other cases where insured has refused to allow inspection and has made it impossible to secure that right, such violation of the policy has been *held* sufficient to prevent recovery thereon, but where the furniture is still where it can be inspected a new trial will be granted.

2. **PLEADING: Defective Petition: Cured by Verdict.** Although a petition could have been more carefully drawn, yet, unless it is so defective as to wholly fail to state any cause of action, it is not open to attack after verdict but is cured thereby.

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3. **TRIAL: Evidence: Motion to Strike Out.** When a witness gives an answer that is unresponsive to the question asked which is a proper one, and the answer is such that it could not be anticipated, the proper practice is to move to strike it out, and such motion cannot be denied on the ground that the party has waited to see what the answer would be before objecting.

4. ———: ———: **Instruction.** Evidence, in a suit on a policy of fire insurance, that plaintiff suffered a daily loss to his business while interrupted by the fire is improper and exceedingly prejudicial when considered with reference to an erroneous instruction that in determining the amount of plaintiff's loss the jury should consider the difference between the value of the property before and after the fire and to "further consider what damages plaintiff may have suffered as a result of said fire."

Appeal from Grundy Circuit Court.—*Hon. G. W. Wanamaker,* Judge.

REVERSED AND REMANDED.

Lesley P. Robinson for respondents.

Bruce Barnett and *Joseph Brown* for appellant.

TRIMBLE, J.—Plaintiff, as the owner of certain furniture in a hotel at Trenton, Mo., brought suit on a policy of insurance to recover a loss sustained by reason of a fire. The suit was for $1000, together with ten per cent damages and a reasonable attorney's fee for vexatious refusal to pay. The jury returned a verdict for $700 loss and $75 attorney's fee.

Criticism is made of the sufficiency of plaintiff's petition. While the petition might have been more carefully drawn, yet it is not open to the charge that it wholly fails to state any cause of action. No attack was made upon it at the trial except by way of an objection to the introduction of any evidence. It is obvious that the petition is amply sufficient after verdict. [Spurlock v. Missouri Pacific Ry., 93 Mo. 530; Gustin v. Concordia Fire Ins. Co., 164 Mo. 172.]

The policy contained a provision to the effect that the insured "as often as required" should exhibit to any person designated by the company all that remained

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of the property. The trial took place in Trenton where the hotel and furniture were located. The furniture was not touched by the fire but was merely damaged by being water soaked and covered with falling plaster. Some of it was broken but by far the larger part was retained and used in the hotel. The trial lasted through two days and at noon of the first day defendant's attorney asked plaintiff to permit a furniture man of Trenton to inspect the furniture claimed to be damaged, but plaintiff refused, giving as a reason it was dinner hour at the hotel. That evening after court adjourned defendant made written application to plaintiff and his attorney to be allowed to have two gentlemen of Trenton view the furniture etc., claimed to have been damaged specifying particularly the furniture desired to be seen and naming various different times at which the inspection could be made if the plaintiff would designate the one suitable.

Plaintiff declined to allow an inspection claiming that the furniture would not disclose what the damage had been after having been cleaned, dried and rubbed up. The carpets, bedsteads, dressers and washstands had not been repaired nor revarnished but had been merely cleaned. It would seem that plaintiff was not willing that defendant should have an opportunity to ascertain, or that the jury should learn, to what extent the carpets were damaged after the water had dried out of them and after the lime had been removed. The provision in the policy was a reasonable one for the protection of the insurer especially as to damage to property not ordinarily open to the inspection of the insurer. It is true the furniture would not *appear* to be so badly damaged as it would if examined immediately after the fire, but this was a matter that could easily be explained by the testimony of plaintiff as to the expense and labor necessary to put the furniture back into proper condition. Besides, it would be as unfair to the company to base the loss and damage wholly on the condition and appearance of the furni-

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ture while wet and covered with plaster when the *real* damage could not be told, as to the insured to base it on its appearance after it was cleaned up. But defendant's request for an inspection did not require the jury to accept its restored condition as the basis of the damage. The jury could still estimate the loss plaintiff had sustained after considering the work done in restoring the furniture. Plaintiff says he did not allow defendant an inspection after the property had been cleaned and dried because then no one could tell what the damage had been. As above stated, that is not the case; but even if there might be some danger of the damage not being so obvious then as immediately after the fire, still to permit plaintiff to refuse on that ground would be to let him decide that question for himself, and that in the face of the agreement in the policy that he would allow such inspection to be made. It was not for him to determine that no idea of the loss could be formed by an inspection of the property. The provision in the policy is a reasonable one, and so was the demand on the part of the defendant to be allowed to inspect the furniture and ascertain what its condition was after the water had dried out of the carpets and mattresses and after the lime had been removed from the furniture. In other cases where the insured, by selling the property and shipping it away, prevented an inspection it was held that this violation of the policy prevented a recovery thereon. [Oshkosh Match Works v. Manchester Fire Assurance Co., 92 Wis. 510; Astrich v. German-American Ins. Co. of N. Y., 131 Fed. 13.] In this case, however, the furniture is still where it can be inspected.

The testimony of plaintiff that he had suffered a loss of $25 or $30 a day to his hotel business while out of business on account of the fire and the condition of the furniture, should have been stricken out as requested by defendant. The statement was in no way responsive to the question put to the witness, so that, as defendant's attorney said, he could not anticipate that the witness would give such answer until it was

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made, and then he immediately moved to strike it out. This motion was overruled and exception saved. Said testimony was improper and exceedingly prejudicial when considered in connection with plaintiff's instruction No. 4 on the measure of damages. This instruction told the jury that in fixing the measure of plaintiff's damages they could consider the difference between the sound value of the property immediately before the fire and the value of the property as damaged, and that they should "*further consider* what damages plaintiff may have sustained as a result of said fire."

As the case must be reversed and remanded for the matters and errors herein above noted, we will not go into the question of whether there was sufficient evidence of a vexatious refusal to pay to justify the submission of that question to the jury.

The judgment is reversed and the cause remanded for a new trial. All concur.

ZEILDA FORSEE INVESTMENT CO., et al, Appellants, v. ST. JOSEPH GAS CO., Respondent.

Kansas City Court of Appeals, April 30, 1917.

1. **PUBLIC SERVICE CORPORATIONS: Gas Company: Duty to Extend Mains.** A public service corporation engaged in supplying gas to the people of a city by means of pipe lines laid in the street under a franchise is not under the absolute or unconditional duty of extending its mains to new territory whenever requested, without regard to the reasonableness of the demand, in the absence of anything in the nature of a special contract or obligation on its part requiring it to do so.

2. ———: ———: ———: **Reasonableness of Demands for Extensions.** The reasonableness of a demand upon a public service corporation, like a gas company, to extend its mains to other uncovered portions of the city is a question for the courts to determine, depend-

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ing upon the expense involved, the number of customers likely to be served and the probable revenue to be derived from the extension as compared with the necessary preliminary outlay and the likelihood of the company receiving a reasonable return thereon.

3. ———: ———: ———: ———: **Contract with Customer for Extension of Main: Validity: Action to Recover Money Paid upon Completed Contract for Extension.** A gas company had a rule not to make an extension unless those desiring it would first advance the cost thereof and receive in payment the amount paid for gas within a certain limited time. Under this rule plaintiff contracted for an extension to certain undeveloped territory and after performance of the contract sued for the money expended in building the extension on the ground that said contract was void, said rule having been deemed by the Public Utilities Commission to be unjust and discriminatory. *Held*, that as the duty of the public service corporation to extend its mains was not absolute or unconditional, the contract was not void in the absence of facts showing that the company was bound to extend its mains on request, and the contract having been performed and the money paid on the strength of it, the money could not be recovered. The fact that the Public Utilities Commission has decided that a universal rule of the character indicated is void, does not affect the question of whether the particular contract in question made under that rule was void and without consideration.

Appeal from Buchanan Circuit Court.—*Hon. Thomas B. Allen,* Judge.

AFFIRMED.

John E. Dolman for appellants.

William E. Strongfellow for respondent.

TRIMBLE, J.—The appeal herein is from the action of the trial court in sustaining a demurrer to plaintiff's petition. It was filed February 19, 1916, and alleged that defendant was a public service corporation engaged in supplying gas for domestic consumption in St. Joseph, Mo., by means of pipe-lines in the streets, under a franchise granted to it by said city; that prior to 1907, defendant made extensions of its gas mains at its own expense, it, at that time, supplying artificial

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gas at $1 per 1000 cubic feet; but that in the year 1907 it ceased supplying artificial gas and began furnishing natural gas at forty cents per 1000 cubic feet and at the same time ceased to make extensions of its gas mains at its own expense but adopted a rule refusing to so extend its mains, and requiring persons outside the district in which mains already existed, but within the city, to lay such extensions at their expense but under the supervision of the defendant and according to its rules regulating the construction of said gas mains.

The petition further alleged that on and prior to July 2, 1912, plaintiffs were each engaged in the real estate business in St. Joseph, Missouri, and were the owners of large tracts of land in a certain section of said city, and on account of the growth of the city in that direction the demand for property in said section had become very great, but, although said locality was supplied with water and electric light and had paved streets, it was impossible for plaintiffs to develop their said property without gas for domestic purposes; that thereupon plaintiffs requested defendant to extend its gas mains so as to serve the community in which their property was located and enable them, the plaintiffs, to carry on their said real estate business, but that defendant refused to extend its mains unless plaintiffs would themselves pay for the extension on the terms of a certain agreement set out as Exhibit A; this agreement consisted of an offer made by the defendant and accepted by the plaintiffs, and signed by all parties, and reading as follows:

"The St. Joseph Gas Company hereby agrees to turn the gas into a four-inch (4-inch) pipe laid by you in Twenty-second street from Jones street to Lover's Lane (this pipe to be laid under the rules of the Gas Company governing such work), and to refund to you one-half of the amount paid for gas consumed on the above line of main for a period of three years from the time the gas is turned into the main; provided, however, that the total amount so refunded by the Gas

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Company shall not exceed the cost of said work. The cost of said work having been estimated at the rate of fifty cents (50c) per foot, that amount is agreed upon as to the maximum to be refunded by the Gas Company in any event. If there is not sufficient gas consumed on said line of main within said three years for one-half of the charge of same to fully pay the agreed amount, namely fifty cents (50c) per foot, the unpaid balance of the cost of said main is to be waived by you, and the main is to become the property of said Gas Company. The computation will be made and paid at the end of the period of three years according to above terms."

The petition then alleged that although plaintiffs protested against said rule, they were compelled, in order to develop and carry on their said real estate business, to accede to said rule and did accede to it, and constructed a four-inch gas main on Twenty-second street from Jones street to Lover's Lane at a cost to plaintiffs of $2850, which main then became a part of defendant's general system of gas mains and which it now claims to own without having paid plaintiffs any consideration therefor whatsoever; that plaintiffs have demanded of defendant payment of said sum of $2850 but have been refused.

The petition further alleged that said rule or regulation of defendant not to extend its mains to those parts of the city where the system had not yet reached, except at the cost of persons residing in such parts, was a violation of law and was made for the purpose of compelling such persons residing or having property in such parts of the city to extend defendant's system of gas mains at their expense, when, under the law and defendant's franchise, it was the defendant's duty to do this at its expense; that said rule or regulation of said defendant and the acceptance thereof by plaintiffs, in this particular case, was never approved by the Public Utilities Commission of the City of St. Joseph nor by the Public Utilities Commission of the State of Missouri, and plaintiffs' acceptance of the

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terms of said rule or regulation was contrary to law, and was void and of no effect.

The petition further alleged that on or about the 31st day of January, 1916, the Public Service Commission of Missouri, after a full hearing thereon instituted by the city at the request of plaintiffs and others, decided and declared said rule or regulation to be unjust, discriminatory and preferential, and prohibited the further enforcement thereof. Wherefore, plaintiffs prayed judgment for said $2850 with interest at 6% from July 2, 1915.

It will be observed that there is no allegation that the defendant has not carried out its part of the contract, nor that the defendant has sought to evade its terms and has not paid, or is unwilling to pay, whatever is due plaintiffs thereunder. The execution of the contract is admitted but plaintiffs allege that it is illegal and void and they ask a return of the full amount of the money they expended under its terms in constructing said main together with interest thereon, although the petition shows that the contract was made long enough before suit was brought for it to have become fully executed. It is true, the petition says the defendant now claims to own said pipe-line without having paid plaintiffs any consideration therefor, but, so far as appears from the petition, this may be because no money was paid to defendant for gas consumed on said line within the three years specified in the contract. There is no allegation that any gas was ever sold therefrom or that there is, or ever was, a single customer using gas on said line. However, these preliminary observations have no *direct* bearing upon the real meat or gist of plaintiffs' complaint, and they are made merely to eliminate the thought that there possibly could be a theory on which plaintiffs might, under the wide and flexible scope of an action for money had and received, be entitled to recover at least a portion of the pipe-line's cost even if some of plaintiff's contentions are not entirely tenable.

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The real theory of plaintiffs' petition is that it was the defendant's *unconditional* or *absolute* duty to extend its pipe lines to plaintiffs' property, so that it might be developed and their real estate business advanced, upon plaintiffs' request for such extension and whenever said request should be made. There are no *facts* alleged in the petition which show that such a request was a reasonable one, nor does it state, even as a conclusion of law, that the request was reasonable. The petition nowhere asserts any facts to even show that there are any persons, residing in the territory to which the extension is desired, who will become either certain or prospective consumers of gas, much less does it say that there is a sufficient number to create a reasonable expectation that the additional consumption of gas created thereby will warrant or justify the expense of the extension. It is true, the petition says it was defendant's duty to make the extension but this is the mere statement of a legal conclusion in the absence of facts showing such duty. The only facts stated are that defendant is a public service corporation engaged, under a franchise, in supplying gas to the city, that plaintiffs in order to develop their property requested defendant to extend its mains thereto, but that defendant, in violation of law, refused to do its duty in that regard. So that, unless it was defendant's unconditional or absolute duty to make the extension under those circumstances, the defendant's duty to accede to plaintiffs' request does not appear from the petition. We think it is apparent from this that the petition is bottomed upon the theory that it was defendant's absolute duty to make the extension upon request regardless of the cost of such extension or the prospect of return thereon and regardless of any other condition or consideration. Of course, it is only upon the theory that it was defendant's legal duty to make the extension, and that plaintiffs were in a sense compelled, under the circumstances, to make it for the gas company, that the contract can be declared void or the money paid thereunder be recovered.

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The rule of law is that a gas company "is not bound to extend its mains or pipes to territory not occupied by it, unless a statute or a binding ordinance, its charter or a contract requires it to do so, even though it have the privilege to occupy any street or all the streets of the municipality. But the matter of extension of mains almost universally is governed by a statute or the company's contract (usually embodied in an ordinance) with the municipality. Sometimes the municipal governing body has the power to order and enforce an extension of the mains; and in other instances the gas company is bound to extend a main only upon application of a certain number of persons agreeing to take gas." [Thornton on Oil and Gas, sec. 529.] Even where the matter of supplying gas to property not abutting upon the company's lines is regulated by statute, a condition of the requirement is that the property be "within a reasonable distance," and what is reasonable is a question for the courts. [Ibid., sec. 528.] In the case at bar the distance, judging from the expense, must have been great, and, of course the reasonableness of the distance would be largely determined by the number of customers likely to be served and the probable revenue derived from the extension.

The rule set forth in Thornton, supra, is announced in Board of Water Comrs. v. Bloomfield, 84 Conn. 522. In Village of Upper Alton v. Alton Gas etc. Co., 165 Ill. App. 333, one of the grounds for sustaining the demurrer to plaintiff's petition was that it nowhere alleged that a sufficient demand for gas existed, in the extension sought, to insure the company a reasonable return for the necessary outlay. In Public Service Corp. v. American Lighting Co., 67 N. J. Eq. 122, l. c. 131, it is held that the obligation on a gas company to lay down a supply pipe to furnish gas to a dwelling or tenement is "subject to the limitation that there shall exist a reasonable expectation that the consumption of gas shall be sufficient to warrant the necessary preliminary expenditure."

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In Minneapolis General Electric Co. v. City of Minneapolis, 194 Fed. 215, 219, the theory that it was the absolute duty of a public service corporation to extend its service conduits, whenever requested, was denied; and it was held that even if this duty were enjoined by ordinance, not in the nature of a special contract with the corporation, it would be void and of no effect. The same ruling is, in effect, announced in Lawrence v. Richards, 111 Me. 95, and in Watson v. French, 112 Me. 371. [See, also, Smith v. Capital Gas Co., 132 Cal. 209.] The right of an inhabitant of a municipality, or of the inhabitants of a particular portion of it, to compel a water company to extend its mains, is not an absolute and unqualified right but is a relative one. [Lukrawka v. Spring Valley Water Co., 169 Cal. 318.]

It does not follow, from the allegation that the Public Utilities Commission of Missouri has decided that the rule which the company adopted in reference to the extension of its mains was unjust, that there is, therefore, an absolute duty imposed upon the company to make extensions under any and all circumstances. A rule that *no* extensions would be made at the company's expense under *any* circumstances is no doubt unjust, but that is a very different thing from the rule that *every* extension must be made, when such is requested, no matter what may be the circumstances or conditions.

It cannot be successfully maintained that the necessary inference, flowing from all the facts alleged in the petition, is that there was, at the time the contract was made, a large enough demand for gas in the territory in question to make it defendant's duty to extend its main. On the contrary, the inference to be gathered from the facts alleged is that there were no customers there then, but that plaintiffs, in order "to develop their said property" and to "meet the growing demands of the city," wanted the main extended. In other words, that, according to plaintiffs' view, judging from the way and direction the city was growing, the plaintiffs could *in the future* dispose of their prop-

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erty to better advantage if their property had a gas main extended to it. This is not an allegation, nor does it carry the inference, that the territory affords a reasonably sufficient demand for gas to justify the necessary outlay or that there was a reasonably certain prospect of such being the case within a reasonable time.

We think the petition was demurrable and that the action of the trial court was right. The judgment is, therefore, affirmed. All concur.

A. SITRON & COMPANY, Respondent, v. BENJAMIN FRIEDBERG, Appellant.

Kansas City Court of Appeals, April 30, 1917.

1. **CONTRACTS: Guaranty: Prosposal: Interpretation: Ambiguity.** A contract of guaranty is composed of the proposal and the acceptance. The proposal is one sided and couched in the language of the guarantor and is therefore to be interpreted as strongly against him as the sense of it will admit.

2. **———: ———: Credit: Specific Sum: Liability.** A contract of guaranty reading that, "In consideration of your firm extending credit to the Gary Clothing Company to the amount of five thousand dollars, I agree to be personally responsible," etc., should be interpreted to mean that the clothing company is to be given credit, if it asks it, in sums that will reach at least five thousand dollars; and if after extending credit for a part of that sum, further credit is wrongfully refused, the guarantor is discharged.

Appeal from Jackson Circuit Court.—*Hon. George H. Kelley,* Special Judge.

REVERSED AND REMANDED.

Lathrop, Morrow, Fox & Moore and *Cyrus Crane* for appellant.

M. B. Aaron and *Blum & Blum* for respondent.

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ELLISON, P. J.—Plaintiff company is a wholesale merchant residing in Chicago and the Gary Clothing Company is a retail merchant residing in Kansas City. On August 27, 1913, defendant executed a contract of guaranty to plaintiff for goods to be sold to the Gary Company and this action is based on that contract. The judgment in the trial court was for plaintiff.

The contract was signed by defendant and sent to plaintiff who acknowledged its receipt and its acceptance. It is in the following words:

"A. Sitron & Co., Chicago, Illinois.

Gentleman: In consideration of your firm extending credit to the amount of five thousand dollars ($5000), I agree to be personally responsible to your firm in case of the failure, neglect or default of Gary Clothing Co. to pay any or all bills when due. It is further understood that all merchandise is sold ninety days net, no discount. In case the bills are not paid when due, the buyer is to have the privilege of an extension of nine months after the day when said bill was due, provided, however, that all bills not paid when due draw interest at the rate of six per cent. (6%) per annum from and after date when due until date of payment, which in no event is to be longer than one year from date of invoice."

On the faith of this guaranty plaintiff sold goods to the Gary Company in excess of four thousand dollars; but refused to make further sales, and thus did not extend credit for as much as the sum of five thousand dollars mentioned in the contract. There was evidence tending to show that the ground of this refusal was that the Gary Company had not paid some bills which had been shipped on faith of the guaranty and also that it had not paid a certain note not connected with the guaranty. At the time of this refusal the credit of from nine to twelve months provided for in the guaranty had not expired.

Plaintiff's interpretation of the contract is that the guaranty covered any credit extended in any amount

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not exceeding five thousand dollars, and that if there is any doubt about it, it should be resolved against defendant; while the latter insists that in order to bring him within its provisions for liability plaintiff must have extended credit, or been willing to do so, for as much as the five thousand dollars worth of goods.

A contract of guaranty consists of a proposal and an acceptance by the person to whom the proposal is made. The proposal is the one sided act of the guarantor and is couched in language selected by him and therefore it is held that where there is any ambiguity the words are to be given the meaning most strongly against his interest which they will bear—as strongly "as the sense of them will admit." [Mason v. Pritchard, 12 East 227; Lawrence v. McCalmont, 2 Howard 426, 449; Granite Co. v. York, 89 Maine 54; Locke v. McVean, 33 Mich. 472, 477; Rindge v. Judson, 24 N. Y. 64; Peoria Sav. Bank v. Elder, 165 Ill. 55, 62; Tootle & Maule v. Elgutter, 14 Neb. 158.] And that rule has been adopted in this State. [Shine v. Bank, 70 Mo. 524, 533; Kansas City v. Youmans, 213 Mo. 151, 166; Hurley v. Fidelity Co., 95 Mo. App. 88, 93.]

Of the above cases, in Mason v. Pritchard, the words of the contract were "for any goods he hath or may supply my brother W. P. with to the amount of 100 pounds." This was held to cover an amount less than 100 pounds and that it was a continuing contract of guaranty until put an end to by recall.

In Rindge v. Judson, a contract to be "accountable that B will pay you for glass, paints, etc., which he may require in his business, to the extent of fifty dollars," was held to be a continuing guaranty, and that the limitation was not on the amount of the credit, but to the sum total of the guarantor's liability. And the same ruling was made on a similar guaranty in Tootle v. Elgutter.

In Peoria Sav. Bank v. Elder, at page 62, it is held that the expression in the guaranty, "To the extent of $12,000," fixes the outside extent of liability, but

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did not require that credit for as much as that amount should be given, before liability would attach.

These cases serve as illustrations, though they cannot be decisive of a contract differently worded. And so it is said by the Court of Appeals of New York in Rindge v. Judson, supra, at page 66, that, "Except to demonstrate principles, not much aid can be obtained from adjudged cases; because each case must depend mainly upon the terms of the instrument, and it is scarcely possible that two instruments should be precisely alike."

With that admonition, we direct our attention to the terms of the guaranty in controversy. Addressing plaintiff, defendant says: "In consideration of your firm extending credit (to the Gary Company) to the amount of five thousand dollars, I agree to be personally responsible," etc. Now we understand that to mean that the company is to be given credit, if it asks it, in sums that will reach at least five thousand dollars. Anything over that would not affect defendant's liability for that much. But a refusal of a request of anything under that would violate the plain terms of the agreement. We may reasonably infer that defendant wished to assist the Gary Company in its mercantile venture, and he believed that not less than five thousand dollars would be sufficient, and so he contracted with plaintiff that if the latter would give that amount of credit he would guarantee its payment. Plaintiff's breaking down partway in extending that credit, was a failure on its part to perform its contract and if without defendant's fault, discharged him. In this connection we think there is nothing substantial in plaintiff's suggestion that to adopt a construction favorable to this view would make it necessary to say that if plaintiff extended credit one dollar in excess of five thousand it would be to violate the contract. We have no right to go beyond the limit of common sense, and remaining within that limit, we must see that to go beyond the sum named, at Gary's request, would not affect defendant's liability. So if Gary &

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Company had refused to ask credit for the full sum; that, of course, would not have affected defendant's liability for what it did ask.

Plaintiff's excuse for stopping credit short of the sum named as referred to at the outset was not valid; and the case not having been tried in accordance with the views herein expressed the judgment is reversed and the cause remanded. All concur.

SUSIE FREEMAN, Respondent, v. LOYAL PROTECTIVE INSURANCE CO., Appellant.

Kansas City Court of Appeals, May 21, 1917.

1. **INSURANCE: Death from Accidental Injury: Evidence as to Cause of Death: Burden of Proof.** In a suit by the beneficiary on a policy of insurance against death by accidental means, where the claim is that insured inhaled a bug which induced pneumonia and thereby brought on his death, the burden is on plaintiff to show not only that such accidental inhalation occurred but also that insured's death came from that cause rather than from disease caused otherwise. The cause of death cannot be left to conjecture.

2. ———: ———: ———: **Admissibility.** In a suit on an accident policy for death by accidental means, where the claim is that insured inhaled a bug which produced pneumonia from which he died, and there is no evidence showing with any degree of reasonable certainty that insured's death was caused by the inhalation except the doctors' opinion that it was, and they admit that if they had not been told of such inhalation, they could not say what was the cause of the trouble, the very life of plaintiff's case depends upon whether the testimony in relation to such inhalation is properly admissible under any exceptions to the hearsay rule.

3. ———: ———: ———: ———: **Opinion of Experts: Patient's Statement: Hearsay.** The evidence of plaintiff's experts as to insured's death from inhalation of a bug was not given in answer to hypothetical questions in which the truth of the claim of inhalation was assumed, nor was it based upon what they themselves found, but upon what the patient related to them concerning a past occurrence and in detailing his condition in the past. Such statements are hearsay, and the opinions of the experts based on them were improperly received.

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4. ———: ———: ———: ———: ———: ———: ———: ———: **Res Gestae.** The evidence that insured's death was caused by the inhalation of a bug consisted solely of statements made some time afterward by him to others. The circumstances under which they were made are considered and held not to be such as to make them admissible as a part of the *res gestae.*

Appeal from Howard Circuit Court.—*Hon. A. H. Waller,* Judge.

REVERSED.

Ross J. Ream and *Samuel C. Major* for appellant.

Jasper Thompson and *A. W. Walker* for respondent.

TRIMBLE, J.—Plaintiff is the beneficiary in a policy of accident insurance issued to her husband by the defendant company. Insured died while the policy was in force and defendant refused to pay. Thereupon this suit was brought resulting in a verdict and judgment for plaintiff in the full amount of the policy with interest, from which the defendant has appealed.

The petition alleged that in said policy defendant agreed to pay plaintiff the sum of $4000 if the death of J. M. Freeman, her husband, "should occur, while the policy was in force, as the result, alone and independently of all other causes, of bodily injuries occasioned by external violent and accidental means, leaving upon the body marks of contusion or wound visible to the eye." The answer admitted the execution of the policy and the death of the insured, but asserted that his death was occasioned by disease and not of a cause covered by the policy; also that insured did not sustain bodily injuries from external violent and accidental means which left upon the body marks of contusion or wound visible to the eye.

Freeman was going from place to place in Howard county driving a team and medicine wagon, engaged in selling medicines. On September 29, 1915, he spent

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the night at the home of Frank Watts. He appeared to be in good health, ate heartily at both supper and breakfast and left Watts' home the next morning, September 30th, about eight o'clock. He drove from there about a mile to the home of R. H. Torbit, having to pass through a gate midway between the two places, and arrived at Torbit's somewhere between eight and nine o'clock. He began showing his medicines to Mrs. Torbit but exhibited difficulty in talking on account of coughing and hacking. To Mrs. Torbit he seemed to be in perfect health except that he coughed considerably and seemed to have some irritation in his throat. Over the objections and exception of defendant's counsel, Mrs. Torbit was asked the following questions and gave the following answers:

"Q. I will ask you to state to the jury what Mr. Freeman said to you was the trouble with him at the time he was talking to you? A. He said a bug flew into his throat and was causing him considerable discomfort.

"Q. Did he say anything about his condition? A. He said it seemed it would neither go down nor he couldn't get it up—could neither get it up nor down, is the way he expressed it.

"Q. State whether or not he indicated the location? A. It seemed it was in the throat here (indicating), is what he said, and would neither go up nor down."

From Mrs. Torbit's testimony, given elsewhere, it appears that Freeman said to her that the bug flew in his throat at the gate, and that he made the statement to her in excusing and explaining his coughing.

Insured then left the house and went out on the farm to see Mr. Torbit and returned in about two hours, but appeared then to be very sick, vomiting and having spells of coughing. He got into his wagon and drove away.

From Torbit's, insured drove about two miles to the home of Willard Liggett, arriving shortly after

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twelve o'clock. Mr. Liggett met him on his way to the house after he had gotten out of his wagon. Liggett noticed that he was pale but during the time he was with him did not observe any coughing. Insured asked if he could lie down saying he was very sick. This testimony was objected to by defendant, but the objection was overruled. Thereupon, over the objections and exceptions of defendant to each, he was asked and answered questions as follows:

"Q. Did he state anything further about his condition? A. He told me the cause of his condition.

"Q. What did he say? A. He said he had got an insect in his throat or windpipe—I don't remember just the words he used—anyway, he said it seemed to stop somewhere down here (indicating on throat), and he couldn't get it up; that he had vomited and it didn't seem to remove the cause of the trouble; that it seemed to settle there; that he was getting sicker all the time, and that he would like to lie down awhile and see if that would help him."

Mr. Liggett remained at the house only about thirty minutes after insured came. Mrs. Liggett testified that insured came in and was lying down for about two hours and complained of being very sick; that he vomited, complained of being sick at the stomach and of headache and backache. She said his breathing at one time seemed a little unnatural but she did not hear him cough during the time he was there. Over the objection and exception of defendant, she was allowed to state that insured said "it seemed like an insect had lodged in his throat" and that "he still felt like he could feel an insect or whatever it was in his throat—he vomited and couldn't get it up."

From Liggett's, insured drove to his home and Doctor Smith was called who arrived about six or seven in the evening. This was September 30. Dr. Smith found him suffering with a pain over his stomach and having fever. He was not coughing. He gave the doctor a history of his case. The doctor did not examine his chest nor did he do so the next day or the day after

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that as he appeared to be better for two or three days, and the doctor merely called in to see him when he was in the neighborhood visiting other patients. After that, however, either on the following Sunday or Monday about four days from the first day, the doctor found him complaining of pains in his chest and coughing some, and upon examination of his chest the doctor found evidence of a cavity in the lower lobe of the left lung. From that time on the doctor visited him every day and sometimes two or three times a day and examined his lungs fully. He says he found nothing except the cavity until about the 11th day when they found evidence of the beginning of pneumonia setting up in the lower lobe of the left lung; that there was no pneumonia in the right lung at that time and he had not found any signs of pneumonia prior to the 11th day. A few days later they found the upper lobe of the left lung was involved, and on the 16th of October the patient died. An autopsy disclosed that both lungs were affected with pneumonia. There was a cavity about four inches in diameter in the left lung from which the tissues had been destroyed and expectorated.

Dr. Lee, who was called in consultation on October 10th, saw deceased three times before he died. His testimony is that at the first time he saw the patient he did not have pneumonia but that there was an abscess or cavity in his left lung, that when he saw him two days later the cavity had enlarged and pneumonia was developing in that lung, and on the evening before his death on the 16th, the pneumonia had spread over the entire left lung and it was solidified and the patient was in a dying condition; that after death autopsies showed both lungs affected with pneumonia.

Both of these physicians testified for plaintiff, over the objections and exception of defendant, that in their opinion the probable cause of the pneumonia was the cavity or abscess they found in the lung and that it was caused by the inhalation of a bug or some foreign substance. No bug or foreign substance was found in the lung; and it is clear, from the testimony of the doctors,

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that their conclusion that the cavity was caused by the inhalation of a bug or some foreign substance was based upon what the patient had told them in that regard. Their conclusions were reached "from the history of the case" and "from the history and symptoms of the case." Each of them admitted that, leaving out the history of the case and what they had heard, they could not tell what caused the cavity. There is no evidence as to how long this cavity had existed before it was discovered, though the doctors seem to have regarded it as of recent origin. But Dr. Smith said the cavity could have been there long before they found it and might have been there all of Freeman's life; and Dr. Lee said a cavity or abscess could be attributed to a tubercular trouble or something of that kind. There can be no question but that the opinions of the plaintiff's experts as to what caused the cavity were based upon the information imparted to them that a bug had flown into the patient's throat, and their testimony is that, had it not been for that information, neither they nor anyone else could have ascertained what caused the cavity or the illness.

Now, without passing upon the question, but assuming that if the original cause of insured's trouble was the inhalation of a bug or some foreign substance then his death was caused by an external violent and accidental means "which left upon the body marks of contusion or wound visible to the eye," so as to come within the terms of the policy, still it is clear that the burden is upon plaintiff to show not only that such accidental inhalation occurred but also that there is reasonable ground for thinking that insured's death came from that cause rather than from disease. The cause of his death cannot be left to conjecture. [Rogers v. Hammond Packing Co., 180 Mo. App. 227, 230; Farner v. St. Louis etc. R. Co., 178 Mo. 125, 134; Wright v. Order of United Comm. Travelers, 188 Mo. App. 457; Carnes v. Iowa State Travelling Men's Assn., 106 Iowa 281; Merrett v. Preferred Masonic etc. Assn., 98 Mich. 338.] Plaintiff's doctors say that they found no pneumonia until after

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the cavity was found, but they also said that there were no uniform symptoms of pneumonia; that it sometimes commences with pains in the stomach, sick stomach, backache and always fever; that in "central" pneumonia or pneumonia affecting the central or deeper portion of the lobe of the lung, the sure indications of pneumonia might not develop for some days after the disease had really commenced. It will be observed that this corresponds with the symptoms of insured. So that really there is no evidence showing with any degree of reasonable certainty that insured's death was caused by the accidental inhalation of a bug or foreign substance, except the doctors' opinion that it was. And they admit that, if they had not been told of such inhalation, neither they nor anyone else could say what was the cause of the trouble. Without such information, they were unable to ascribe it to an accidental cause, certainly not to a cause producing death as the "result . . . of bodily injuries occasioned by *external* . . . *means,* leaving upon the body marks of contusion or wound visible to the eye," which was required both by the policy and the pleading. Plaintiff's expert evidence shows there were no marks of contusion or visible evidences of injury upon the outside of the body. The very life of plaintiff's case, therefore, hangs upon the questions whether insured's declarations to Mrs. Torbit and the Liggetts were admissible as a part of the *res gestae,* and whether the opinions of plaintiff's experts as to insured's illness and death from an accidental, *external* cause, were competent when it is certain that they could not have ascribed it to even an accidental cause if they had not been told that insured had inhaled a bug. Defendant not only objected to the evidence but moved to exclude it after it was given.

With reference to the opinions of plaintiff's experts as to insured's death being produced by an accidental, external cause, it should be observed, that they were not given in answer to hypothetical questions in which the truth of insured's inhalation of a bug or some foreign substance was assumed. Plaintiff's doctors testified to

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visiting insured and to his condition throughout his illness and what the autopsy revealed and then testified that his illness was produced by the inhalation of a bug or some foreign substance. But their evidence discloses that this was based upon what the patient disclosed to them. In other words, that which they themselves ascertained from their own examination and experience did not reveal the cause to be from an accidental external source, but the patient told them he had inhaled a bug, they believed him and accepted it as true, and on that gave their opinion that the inhalation was the cause. On an issue such as this, however, the rule is that, when expert opinion evidence is not given under hypothetical questions, before the expert gives his opinion "he must first be shown to have a personal knowledge of the facts sufficient to enable him to form an opinion." [11 R. C. L. 577.] Now it is not contended that the declarations of the insured to his physicians were admissible as a part of the *res gestae.* The rule is that a physician may testify to statements of the patient relating to his condition *at the time,* but statements relating to a past condition or to circumstances surrounding the receiving of an injury or the manner in which it was received, are not admissible. [Brady v. Springfield Traction Co., 140 Mo. App. 421, 428; Poumeroule v. Postal Telegraph Co., 167 Mo. App. 533, 539; Holloway v. Kansas City, 184 Mo. 19, 39; National Masonic etc. Assn. v. Shryock, 73 Fed. 774; David v. Commercial Mut. Accident Co., 166 Ill. App. 490.] It is said in Holloway v. Kansas City, supra, that statements of a patient to a physician as to past physical condition are mere hearsay, and that the physician, in giving his opinion as an expert, cannot take such statements into consideration. Consequently, in the case at bar, the opinions of plaintiff's experts, being based upon hearsay, were inadmissible. But this will only necessitate the remanding and not a reversal of the case outright, if the declarations of insured to Mrs. Torbit and the Liggetts, as to having inhaled a bug, are admissible as a part of the *res gestae.* For, if those declarations

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are admissible, then the plaintiff would be entitled to another trial at which she could submit the question of the cause of her husband's death to her experts on the hypothetical assumption that he had inhaled a bug or some foreign substance. So that a decision of the question whether said declarations are admissible will determine whether this case should be merely remanded for a new trial or reversed outright.

The declaration to Mrs. Torbit was made after insured had driven a half mile from the gate, where the inhalation is said to have occurred, and after he had entered the house and *had begun showing his medicines.* She said she saw nothing the matter with him, he appeared to be in perfect heatlh except that he coughed considerably. She first noticed his coughing when he began to talk and show his medicines. He was showing his medicines and he could hardly explain for coughing and hacking, and he apologized for it, and in doing so told her a bug flew in his throat. She says, "I guess he thought it necessary to make an explanation, because there was so much of it." Mrs. Torbit's husband was not very well and Mr. Freeman was saying he thought he had something to help him and went out on the place to see him. Now, it is well settled that declarations need not be contemporaneous with the exciting cause, nor can there be any general rule fixing a definite length of time as determinative of their admissibility. But where there is a lapse of time between the occurrence and the declarations, the latter must be made under circumstances which show that they are the spontaneous, unreflecting, instinctive impulse generated by some physical shock, stress of nervous excitement, or excited feeling which extends continuously and without abatement or dissipation from the moment of the occurrence to the time of the declaration in such full sway as to dominate the reflective faculties and take away the opportunity for reasoned reflection. [3 Wigmore, secs. 1747, 1749, 1750.] That is not the situation here, nor anything like it. Insured is *carrying on his business,* showing his medicines, in the course of which he is coughing and

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hacking, and incidentally, as a matter of politeness, he explains the cause thereof by relating an occurrence that took place at the gate, and then goes out on the farm to see a prospective customer.

The other declarations to the Liggetts are made some hours afterward. He is not coughing then but is pale. He is sick at the stomach and is suffering with headache and backache but is not giving a spontaneous exclamation under the stress of his feelings. He is asking for a place to lie down, saying he thinks he will be better. What he there says about having swallowed a bug is not the spontaneous instinctive impulse born of his situation or condition and under the stress of which the control of his reflective faculties are in abeyance. Neither in the statements here made nor in those made to Mrs. Torbit is there such a continuous uninterrupted connection between the occurrence and the declarations as to constitute the two one transaction or to make the latter the spontaneous exclamations of the real cause free from the influence of the reflective faculties to reason over and narrate the happening of a past event. We think the declarations were not admissible as a part of the *res gestae,* and that this conclusion is supported by the following authorities. [Hopper v. Standard Life Ins. Co., 166 Mo. App. 209; Leahey v. Cass Ave. etc. Ry. Co., 97 Mo. 165; Ruschenberg v. Southern Electric Ry. so., 161 Mo. 70; Barker v. St. Louis etc. R. Co., 126 Mo. 143; State v. Hendricks, 172 Mo. 654, 672; Redman v. Metropolitan St. Ry., 185 Mo. 1; Dunlap v. Chicago etc. R. Co., 145 Mo. App. 215; Grant v. Kansas City Southern Ry. Co., 172 Mo. App. 334; Keefer v. Pacific Mut. Life Ins. Co., 201 Pa. 448; National Masonic Accident Ass'n. v. Shryock, 73 Fed. 774.]

The burden being on plaintiff to establish that insured's death was caused by bodily injury sustained by external violent and accidental means, and there being no evidence of such unless insured's declarations be admitted, and they not being admissible as a part of the *res gestae,* it follows that the case should be reversed. It is so ordered. The other judges concur.

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STATE OF MISSOURI, Respondent, v. ALBERT P. GEIST, Appellant.

Kansas City Court of Appeals, June 11, 1917.

INTOXICATING LIQUOR: Two Offenses: Instructions. Where the evidence for the State makes two prima-facie cases of a sale of liquor to two different persons and the evidence for defendant contradicts both, it is error to submit to the jury that they could find him guilty if they believed he sold to one *or* the other.

Appeal from Putnam Circuit Court.—*Hon. George W. Wanamaker,* Judge.

REVERSED AND REMANDED.

Cooley & Murrell and *N. A. Franklin* for appellant.

E. A. Jarman for respondent.

ELLISON, P. J.—Defendant was charged generally and convicted of the offense of selling intoxicating liquors in Putnam county in violation of the Local Option Law in force in such county.

He kept a lunch room or restaurant and had a clerk or assistant named Martin. The evidence for the State related to sales at different times, said to have been made to two men, one named Craft and the other Ranes. An instruction was given in which it was submitted that if the jury believed from the evidence that defendant "sold Craft *or* Ranes" intoxicating liquors, they would find him guilty. Following the reasoning in State v. Washington, 242 Mo. 401, and State v. McGrath, 73 Mo. 181, error was committed in giving this instruction.

It was made an issue whether a sale was made to either, and a part of the jury may have believed a sale was made to Craft but not to Ranes, and the remaining jurors may have believed the converse. Thus a verdict could have been reached under the instruc-

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tion without unanimity as to either. We cannot distinguish the case from those cited.

This is not a case where one offense is involved, it being a point of dispute as to which of two persons the offense was committed with. But it is a case which, under the evidence, involves two distinct offenses, one a sale to Graft and the other a sale to Ranes. If there had been but one offense in controversy and an uncertainty as to which of two persons was the purchaser, then an instruction that if the jury believed the sale was made to either, they should find the defendant guilty would be proper. For, in such case, all of the jury could unite in a verdict that the offense was committed and find the defendant guilty, though they might not agree as to which of the two persons the sale was made to.

But where the State marks out, prima facie, two cases, one a sale to Craft and the other a sale to Ranes, and the defendant makes a case contradicting both, then the entire jury must find that one or both these sales were made, and an instruction for the State must not be so worded, that less than the entire jury will be authorized to return a general verdict of guilty simply because they all believe he committed one or the other of the two offenses, but cannot agree as to which.

The judgment is reversed and the cause remanded. All concur.

TRIMBLE, J. (concurring)—On account of the principle announced in State v. Washington, 242 Mo. 401, I feel constrained to concur in the view that the State's instruction is erroneous. Under it, as worded, it is possible that a jury might return a verdict of guilty and yet not agree on which one of the two offenses mentioned the defendant committed. An instruction in a criminal case should not be so worded as to affirmatively invite or permit this to be done. It would seem that similarly there is just as much liklihood of a jury agreeing upon a verdict, and yet not agreeing upon what particular offense was committed, in any

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prosecution for the sale of intoxicating liquor where, under one charge, there is evidence of several different sales and the State's instruction tells the jury that if they believe from the evidence beyond a reasonable doubt that the defendant sold liquor at any time within the year they will find him guilty. But, in that situation there is nothing in the instruction which (like the one at bar) affirmatively makes it possible for the jury to return a verdict of guilty without being unanimous as to the offense of which they find the defendant guilty. However, any possible chance of this occurring may be obviated by so wording the instruction as to make it clear that to authorize a verdict of guilty the jury must agree upon the offense of which they believe him to be guilty. The result reached in the disposition of this case should not be construed as limiting or preventing a prosecutor from offering, if he so desires, evidence of more than one sale in support of a single charge.

CHARLES DUFFY, et al, Respondent, v. CHARLES A. McGEE, Appellant.

Kansas City Court of Appeals, June 11, 1917.

1. **NEGLGENCE: Shop-keeper: Box of Merchandise: Liability.** A shop-keeper had a box of heavy goods unloaded on the sidewalk in front of his place of business. It was six feet high, three feet wide and about one foot and a half thick. He caused it to be leaned up against the building with the bottom so close to the building as to make its position insecure. Plaintiffs' child was running by when the box toppled over and killed her. The shop-keeper was *held* liable; and it was further *held* that the rule of *res ipsa loquitur* was applicable.

2. **RES IPSA LOQUITUR: Negligence: Presumption.** When an occurrence takes place which, in the ordinary course of things does not happen if those who have the management of the place use proper

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care, it affords reasonable evidence, in the absence of explanation by defendant, that it arose from want of such care.

3. **NEGLIGENCE: General Charge.** A charge of general negligence admits of the application of the rule of *res ipsa loquitur*.

Appeal from Jackson Circuit Court.—*Hon. Harris Robinson,* Judge.

AFFIRMED.

E. H. Busiek and *Paul R. Stinson* for appellant.

Warner, Dean, McLeod & Langworthy, R. P. Rogers and *James P. Kem* for respondents.

ELLISON, P. J.—Plaintiff's action is founded on the death of their small daughter, aged six years, which they charge to the negligence of defendant. They recovered judgment in the trial court.

Defendant is a merchant doing business on the north side of Independence avenue in Kansas City. Between three and four o'clock on the 9th of October, 1914, defendant had deposited on the sidewalk in front of his place of business, a heavy box filled with a "kitchen safe" or "cabinet." The box was about six feet high, three feet wide and one foot and a half thick. It was leaned up length ways against the front of the building. The foot of the box was placed so close to the building as to make its leaning insecure. Plaintiffs lived in the second story of the building in which defendant kept his store and two or three hours after the box was thus placed, the little girl was sent down the street on an errand to a grocery store. She came down the stairs, started west and in passing by the box it fell upon and killed her.

How the box came to fall just as she was in reach of it, is the question contested. Defendant insists that the evidence for plaintiff leaves the matter in such conjecture and doubt as to demand a reversal of the judgment. And that the evidence in his behalf shows that the child stopped as she was passing and in endeavor-

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ing to climb upon the box it toppled over on her. While plaintiffs contend that there was abundant evidence, coupled with the circumstances and inferences to be reasonably drawn therefrom, tending to show that the lean of the box against the building was so slight it was liable at any moment, on a jar, or vibration, to fall backward across the sidewalk.

The two points made against the judgment are that the verdict is contrary to the physical facts and natural law; and, second, that plaintiffs failed to show the death was caused by the negligence charged in the petition.

At the outset we will say that it is evident the jury thought defendant's witness was mistaken when he testified that he saw the little girl attempt to climb on the box. And we will therefore endeavor to ascertain what the evidence tended to show in behalf of the plaintiffs.

A witness who assisted defendant in unloading the box testified that "the bottom end of the box was so close to the building, it could turn over very easily." A man, with a companion, who had just passed by the store, observed the box which he stated to be about six feet high, three feet broad and eighteen inches thick leaning against the building. He stated that the box "was sitting very close to the store, but leaning back against the wall;" that the box "was not quite far enough from the building to really lean up there good, it was pretty close at the bottom." He noticed "a little child ran down the stairway" just as he was passing. She ran by him and he heard the box fall. He turned and saw the box lying down on the walk when he and his companion raised it off the child. He repeated that the child "passed right by me and just immediately after it (the child) passed I heard the box fall." We think it important to note at this place the further testimony that the child was lying face downward with the box on her back, her head to the west and her feet to the east. If she had pulled the box over on her by climbing on it, she naturally would

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have fallen over backwards with her back to the pavement, her head to the south and her feet to the north toward the bottom of the box. This is a reasonable inference corroborating the witness who stated that immediately she passed him he heard the box fall, leaving no time for her to have stopped and climbed on the box; and affording the jury ample ground to believe that the box, on account of its slight and insecure lean to the building, was falling and caught her as she passed.

When a heavy article is left in a position close to the line between security and insecurity, it is difficult to precisely know whether it is one or the other except from results. This high box with a narrow base, was left leaning against the wall at such an angle as to attract notice of its danger. The stability of its position may have been so slight as the giving way of a mere fiber of the wood resting upon the pavement, or the crushing of a particle of dirt, or the gradual imbedding of a pebble, would have sufficiently disturbed its equilibrium as to cause it to topple over onto the walk.

We think a case was made for the jury to determine. [Jackson v. Butler, 249 Mo. 342, 359; Gallagher v. Illuminating Co., 72 Mo. App. 576.] In the first of these a locker which was leaning against the wall fell upon the plaintiff. In the second an arc lamp fell upon the plaintiff; and in that case Judge Bond cites Byrne v. Boodle, 2 Hurlst. & C. 721 and Briggs v. Oliver, 4 Hurlst & C. 403. In the first a barrel of flour fell from an upper window of defendant's place of business; and in the second a packing case was leaned against the premises of another and fell upon the plaintiff. In each, it was held that evidence of the fall of those articles, threw the *onus* on the defendant to show he was free from negligence. This was under the rule that where an occurrence takes place which in the ordinary course of things does not happen if those who have the management of the place use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that it arose from want of such care.

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That the case made is covered by the petition there can be no doubt. The charge of negligence is general. It is that "defendant negligently placed, left and deposited in a dangerous position on the sidewalk, just in front of said store room" the box, etc. This was not a specification of specific negligence so as to cut out the application of the rule of *res ipsa loquitur*. [Jackson v. Butler, supra, 249; Gallagher v. Illuminating Co., supra.]

The judgment must be affirmed. All concur.

J. A. COOLEY, Admr., Respondent, v. ROBERT J. DUNHAM et al, Receivers of MET. ST. RY. CO., Appellants.

Kansas City Court of Appeals, June 11, 1917.

1. **NEGLIGENCE: Damages: Carrier and Passenger: Crowded Street Car.** A carrier of passengers operating a car, so densely and greatly over-crowded that some were compelled to stand on the steps and hold to the handrails, must see that the car is managed with the highest degree of care which these circumstances called for. A car, thus loaded and with passengers on the steps, was proceeding moderately along the street when it suddenly gave an unusual and violent jerk which threw a passenger off and killed him. *Held*, that such unusual and violent jerk occurring under those circumstances was prima facie unnecessary and negligent.

2. **———: ———: Death Statute: Suit by Administrator: Pleading: Petition: Evidence: Demurrer.** In a suit by an administrator for the benefit of the heirs of an unmarried adult under the fourth clause of section 5425, R. S. 1909, a demurrer to the evidence cannot be sustained on the ground that the petition states no cause of action in that there was no allegation to show that the beneficiaries —a father, mother and sister—had suffered a pecuniary loss by the death of the deceased. While the petition contained no such allegation, yet it stated a cause of action as to the penal part of the statute and authorized a recovery of $2000 allowed therefor. But the demurrer asserted that no cause of action whatever was alleged, hence the court would have erred in sustaining it.

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3. ———: ———: ———: ———: ———: ———: **Pecuniary Loss.** Where the suit under the death statute is by a husband, wife, or minor child, or by parents for the death of a minor, the law will perhaps imply pecuniary loss arising from that relation; but where the death is that of an adult, upon whom the law imposes no duty of a pecuniary nature toward the persons for whom the suit is brought, facts should be pleaded showing that a pecuniary loss has been sustained, otherwise a case for damages on account of pecuniary loss is not stated.

4. ———: ———: ———: ———: ———: ———: ———. In a suit by an administrator under the fourth clause of the death statute, if the petition does not plead facts showing that the beneficiaries for whom the suit is brought have suffered a pecuniary loss, no recovery can be had for anything more than the penalty allowed by the statute.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield,* Judge.

AFFIRMED (*conditionally*).

Clyde Taylor, Charles A. Stratton and *C. C. Crow* for appellant.

Gage, Ladd & Small for respondent.

TRIMBLE, J.—On the morning of August 26, 1912, Orion G. Thompson, while riding as a passenger on a car of the street railway then in the hands of the defendant Receivers, was thrown to the pavement and killed. He was twenty-three years of age, without wife or child, either natural born or adopted, and left surviving him, as his only heirs at law, a father, mother and sister. An administrator was duly appointed, and on December 23, 1912, this action was brought under section 5425, Revised Statutes 1909, to recover the damages therein provided for a death caused by the negligent operation of a car. While the suit was pending the administrator died and the present plaintiff was duly appointed administrator *de bonis non* and the suit was properly revived. Upon a trial of the case, plaintiff, on February 29, 1916, recovered a verdict and judgment for $4833.33, and the defendants have brought the case here on appeal.

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The case, as presented by the petition, is that the car was very greatly crowded with passengers, so much so that Thompson was compelled to stand upon the step of the rear platform thereof with the knowledge, consent and approval of the conductor who was himself standing on the rear platform and who with the motorman was in control of the movements of the car; that Thompson, while so standing on said rear step was holding to the iron standard or railing of said car; that while the car, thus crowded and with Thompson thus on the rear step, was moving westward along Eighteenth street at a moderate rate of speed, the motorman negligently started it forward with a sudden and violent jerk which loosened Thompson's hold and threw him violently from his position on the step to the pavement, causing his death. The petition duly alleged the appointment and qualification of the Receivers, and that they were in charge of the street railway at the time, and further alleged the appointment and qualification of said administrators. It also alleged the age of Thompson, that he left no wife nor child, natural born or adopted, but that he did leave surviving him a father, mother and a sister as his heirs at law.

The answer, aside from an admission as to the Receivers being in charge, was a general denial.

At the close of all the evidence in the case, defendants offered a demurrer thereto which was overruled. It is urged that the court committed reversible error in so doing. This contention is based upon three grounds: 1. That the petition does not state facts sufficient to constitute a cause of action; 2. That plaintiff failed to prove negligence entitling him to a recovery; 3. That there was no proof of the specific negligence alleged, to-wit, that the motorman negligently started the car forward with a sudden and violent jerk.

The claim that the petition states no cause of action grows out of the fact that there is no allegation in it to show that the persons mentioned in the petition, for whom the administrator sues under the fourth subdi-

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vision of the statute, have suffered a pecuniary loss, that is, have been *damaged,* by the death of the deceased. The point may be more clearly stated thus: Since the Supreme Court has construed section 5425 as being *penal* to the extent of the minimum sum of $2000 and as *compensatory* for all above that amount, and since the suit is for all that the statute allows, therefore, unless the petition states facts showing that the beneficiaries under the fourth clause of the statute have suffered a *pecuniary* loss, it has not stated a cause of action for damages of a *compensatory* nature. Without going, at this point, into the question of whether the petition should have alleged facts showing that the beneficiaries, for whom the administrator sued, suffered pecuniary loss, i. e. were *damaged,* in order to entitle a recovery for more than the penalty allowed by the statute, we are of the opinion that such omission in the petition did not entitle defendants to have their demurrer to the evidence sustained. The petition did not, on that account, fail to state a cause of action as to the penal part of the statute. The statute certainly allows $2000 as a penalty regardless of whether the persons for whose benefit the suit is brought have suffered pecuniary loss or not. Hence the petition did state a cause of action as to the penalty provided. But the demurrer to the evidence asserted that plaintiff was not entitled to recover anything, and if the court had sustained it, that would have upheld such assertion. Manifestly this would have been erroneous. The demurrer to the evidence was, therefore, properly overruled, so far as the ground for it now under consideration is concerned. Nor can the defendants now be heard to say that the petition states no cause of action. The case presented is not one where the petition, if defective in the particular stated, wholly fails to state any case whatever.

Neither do we think plaintiff failed to prove negligence entitling him to a recovery. The evidence in plaintiff's favor tends to show that the car was very heavily crowded with passengers. The car was full,

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the front vestibule where the motorman stood was full, the rear platform was crowded and one passenger was on the bumper back of the car. The entrance to the rear platform was on the north or right hand side of the car. One step led from the ground to the rear platform which was without any doors, so that one who boarded the car would mount this step and from there go to the platform without having to open a door. There were three passengers standing on the step and riding in that position for at least four blocks before the accident. One of these was Thompson who was holding to the iron bar or guard. He was there when the third man got on the step. The conductor was on the rear platform during all this time and knew of the position of deceased and the others on the step. The evidence tends to show that the men on the step could not get up into the car on account of the crowd. The car proceeded at a very slow gait and then it suddenly gave a violent jerk which loosened Thompson's hold on the rail and threw him off, he striking the pavement upon the back of his head, which resulted in his death. There was evidence showing the sudden and violent jerk. The nature of the jerk and its effects, and whether such a jerk was negligence, were questions for the jury. The motorman and the conductor both knew the car was very densely crowded. The conductor knew he had passengers standing on the steps and holding on with their hands. If he chose to allow them to ride in that position it was his duty to see that the car was managed with the highest degree of care which the circumstances called for. If the motorman did not know passengers were on the steps, the conductor should have told him. There is no evidence that he did not know it however. What the conductor knew the motorman should have known under these circumstances. The motorman did not testify nor was any explanation given of the unusual and violent jerk. Such a jerk, suddenly occurring when the car was proceeding moderately, was prima facie unnecessary, and to cause it under the circumstances of this case was negligent. [Modrell v.

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Dunham, 187 S. W. 561, 563; Hecke v. Dunham, 192 S. W. 120; Elliott v. Metropolitan St. Ry., 157 Mo. App. 517; Witters v. Metropolitan St. Ry., 151 Mo. App. 488; Baughman v. Metropolitan St. Ry., 177 S. W. 800.] This also answers the third ground of appellants' demurrer to the evidence, namely, that there was no evidence that the motorman was negligent or that he negligently started the car forward with a sudden and violent jerk.

A reading of plaintiff's instruction No. 1 discloses that it does not assume that Thompson was on the step of the car. It required the jury to find whether he was thrown from the step. Manifestly he could not have been thrown from the step if he was not on it. Appellants' instruction No. 1 told the jury that before they could find for plaintiff they must find that deceased was standing upon the back step of the car. So that the jury could not fail to know that it was left for them to say whether he was standing on the step or not. There was very slight evidence, if any, that he was standing anywhere else. The conductor, the only witness who did not say deceased was standing on the step, merely said he "believed" deceased was in the vestibule and that he didn't "think" he was on the step. If this makes a conflict in the evidence as to where he was standing, then that was a contested issue. However, even if there is evidence only on plaintiff's side as to a *necessary* fact in the case, an instruction for plaintiff must not assume the existence of such necessary fact, but plaintiff's instruction did not violate the rule in this regard.

Neither does plaintiff's instruction No. 1 assume that the motorman caused the car to jerk. It expressly left that issue to the jury in as plain terms as words could put it. In fact all of the matters upon which plaintiff's case was predicted were left for the jury to decide. [Elliott v. Kansas City, 198 Mo. 593, 615-6.]

The conductor admitted that the car had a "big load," a "very heavy load," that the rear platform was full of passengers, that there were passengers

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standing on the step the number of which he did not know. He also admitted that he himself was on the rear platform, that he talked to deceased before the accident, and after the fall recognized him as the one to whom he had talked. True, the conductor says he *thought* deceased was on the platform and not on the step, but if, as plaintiff contends and the jury has found, deceased was on the step the conductor knew that also. However, it was not necessary that the conductor should have knowledge that deceased was the *particular person* standing on the step. The knowledge necessary to create negligence in this case was the knowledge that passengers were riding there. This knowledge called for the duty of operating the car with the care required in that situation. Hence the knowledge of the conductor was not a controverted issue in the case, and plaintiff's instruction No. 1 was not faulty in failing to submit that issue.

Said instruction does not assume that Thompson was in the exercise of ordinary care. The clear meaning of the instruction is that the jury were to find whether deceased was exercising care when injured. [Harrod v. Hammond Packing Co., 125 Mo. App. 357, 363.]

Said instruction correctly defined the degree of care required in the operation of the car. It told the jury that "the defendants were bound to run and operate their car with the highest practicable degree of care of a very prudent person engaged in like business, in view of all the facts and circumstances, as shown in the evidence", and "to such practicable degree of care of a very prudent person as would be commensurate with the danger, if any, to which you may believe from the evidence any of the passengers on said car were exposed at that time." The fact that the car was so loaded with passengers that some of them, including Thompson, were on the step where they were more than ordinarily exposed to danger from sudden and violent jerks, imposed a degree of care commensurate with that degree of danger. Hence the subsequent clause in

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the instruction saying that if the jury believed from the evidence that in starting the car with a sudden or violent jerk the defendants "were guilty even of slight negligence in the management and operation of said car" etc., was not erroneous. It has been approved in other cases. [Stauffer v. Metropolitan St. Ry. Co., 243 Mo. 305, 327, 332; Zwick v. Swinney, 178 Mo. App. 142; Richardson v. Metropolitan St. Ry. Co., 166 Mo. App. 162; Brod v. St. Louis Transit Co., 115 Mo. App. 202, 209.]

The instruction was not rendered too broad by the phrase "any of the passengers." This phrase was used in explaining in general terms the duty and degree of care the defendants owed to their passengers. The instruction then went on to predicate the facts which the jury should find *as to Thompson* before they could find for plaintiff. Those facts were such as, if true, required the operatives of the car to exercise the degree of care above specified *toward him*. The instruction did not seek to recover for any negligence shown to other passengers. Nor did the evidence show that any other passenger was injured.

In instruction No. 3 the court instructed the jury that if they found for plaintiff the verdict should be for not less than $2000 nor more than $10,000, and that in determining the amount, if any, above $2000 "you may take into consideration the pecuniary loss, if any, occasioned to the father, mother and sister of the deceased, by the death of the deceased" etc. This instruction was objected to and exceptions saved. The defendants asked an instruction to the effect that even if the jury found for plaintiff the verdict should not exceed $2000. The defendant also asked two other instructions, one that there was no evidence of pecuniary loss to the father, and the other that there was none of such loss to the sister. These were all refused and defendants excepted. Passing the questions whether there was any evidence of pecuniary loss to the sister or to the father and the effect thereof upon the case if there were none, we go to the questions of whether

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plaintiff was entitled to include pecuniary loss in his instruction No. 3, and whether defendants' instruction limiting recovery to $2000 should have been given. The basis for these two questions is the fact that the petition contained no allegation that the relatives and heirs had sustained any pecuniary loss. Nor did it allege any facts from which a *pecuniary* loss could be inferred. Indeed, it did not allege, even as a conclusion of law, that the said relatives and heirs were damaged. It merely stated that Thompson, twenty-three years old and without wife or child, was killed under the circumstances above outlined and that he left the above named heirs, wherefore "plaintiff prays judgment against the said defendants for the sum of ten thousand dollars." No inference could be drawn from these facts that said heirs were entitled to *compensatory* damages by reason of any pecuniary loss they had suffered. And it is only by reason of such a loss that they could receive *compensation.* It would seem that logically and on general principles, where the suit is by an administrator under the 4th clause of the statute, unless the petition presents a case of pecuniary loss, damages on account of *such* loss should not be awarded. Where the suit is by a husband, wife, or minor child, or by parents for the death of a minor, the law will perhaps imply pecuniary loss arising from that relation; but where the death is that of an adult, upon whom the law imposes no duty of a pecuniary nature toward those persons for whom the suit is brought, it would seem that facts should be pleaded showing that by reason of such facts, a pecuniary loss has been sustained, otherwise a case for damages *on account of pecuniary loss* is not stated. [Smith v. Pryor, 190 S. W. 69, 71.] It may be that this particular question as applied to section 5425 has not been specifically and expressly decided. The Supreme Court has held that the section is penal as to the minimum sum allowed, but is compensatory as to all above that amount. [Boyd v. Missouri Pacific Ry. Co., 249 Mo. 110, 126; Johnson v. Chicago etc. R. Co., 193 S. W. 827, (approving Johnson

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v. Railroad. 174 Mo. App. 16).] It should be observed that in the case at bar it is not material whether the statute is held to be *purely* compensatory above $2000, since the question here is as to whether plaintiff is, *under his pleading,* entitled to an instruction authorizing the jury to consider the pecuniary loss decedent's heirs have sustained. In Johnson v. Dixie Mining etc. Co., 171 Mo. App. 134, 139, the petition was successfully demurred to in the trial court because "the administrator failed to allege the name or names of the beneficiaries for whom he sued and for a failure to allege *a state of facts* from which the measure of damages in an action brought under these sections *could be ascertained.*" [Italics ours.] The Springfield Court of Appeals upheld the demurrer, but, on a dissent, the case was certified to the Supreme Court. Before the case reached that court, the St. Louis Court of Appeals in Troll v. Laclede Gas Light Co., 182 Mo. App. 600, 604, held that in a suit by an administrator under sections 5426, and 5427, one seeking to maintain an action thereunder must both allege and prove such facts as will bring him strictly within the statutory provisions. In that case the petition failed to name the persons for whom the administrator sued. In Kirk v. Wabash Ry. Co., 265 Mo. 341, a suit by an administrator under the 4th clause of section 5425, the Supreme Court held that since there was neither allegation nor evidence that deceased was survived by any one competent to take under him by the law of descents, no case was made. When the case of Johnson v. Mining Co., certified from the Springfield court, reached the Supreme Court, that tribunal held (187 S. W. 1), that the real question involved was whether the administrator sued for the benefit of decedent's *estate* or for the benefit of beneficiaries other than the estate. The court construed the Springfield court decision as holding that the administrator does not sue for the benefit of the estate but for the surviving beneficiaries and that the petition should name them and plead such facts as may be necessary to show the damages suffered. The court then

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cited with approval the other decisions hereinabove mentioned and held that in the Kirk case they had decided the question in dispute involved in and causing the certication. Now, as intimated above, it may be that the Supreme Court's decisions are strictly limited to the question of the necessity of an administrator's petition showing that there are persons in existence who are entitled to the benefits of the statute. But, as stated above, it would seem that if all above $2000 in the statute is in the nature of *compensatory* damages, then, in order for an administrator to recover *compensation* for the beneficiaries, he should allege facts showing that they have suffered a pecuniary loss for which they should be compensated. In this case no such facts were alleged, nor were any facts alleged from which a right to compensation could be inferred or implied. The only right accruing under the allegations of the petition was the right to recover by way of a penalty. Even if it be conceded that the jury could award, as a penalty, more than the $2000 on account of the aggravated circumstances of the killing, still, since plaintiff was given an instruction allowing damages for pecuniary loss, there is no way of telling how much above the $2000 was for pecuniary loss. Indeed, the inference is that all of it above the $2000 was for such loss and not on account of any aggravated circumstances, since there are no circumstances of that character shown to have been connected with the negligent act of making the car jerk. Therefore, the error in giving plaintiff's instruction on the measure of damages, and in refusing defendants on that subject, can be cured only by a remittitur of all above $2000 or by remanding the case for a new trial. The usual order in such cases will leave it for plaintiff to decide which he will do. If plaintiff will, within ten days from the announcement of this opinion, enter a remittitur sufficient to leave the judgment at $2000 and interest thereon, the judgment will be affirmed, otherwise it will stand reversed and the cause remanded for a new trial. It is so ordered. The other judges concur.

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MRS. SADIE H. BRITT, Respondent, v. ALVA M. SUMMERS, alias ALVA MONTGOMERY, and A. B. C. STORAGE & VAN COMPANY, Appellants.

Kansas City Court of Appeals, June 11, 1917.

REPLEVIN: Justices of the Peace: Jurisdiction. In a replevin suit where a justice of the peace finds that both plaintiff and defendant have an indefinite interest in the subject-matter, he has no jurisdiction under the statutes to certify it to circuit court as an equitable matter for settlement. And this action by the Justice does not confer jurisdiction of the subject-matter on the circuit court even though the parties appear in the latter court and try the case without objection.

Appeal from Jackson Circuit Court.—*Hon. R. J. Ingraham,* Special Judge.

REVERSED AND REMANDED (*with directions*).

W. D. Brown and *M. J. Kilroy* for appellants.

A. W. Gray for respondent.

BLAND, J.—This is a replevin suit instituted before a justice. The latter after hearing the evidence took the case under advisement and thereafter made the following order:

"Now, on this 17th day of March, 1914, 10 a. m., the justice, after mature deliberation, find both plaintiff and defendant have an indefinite interest by each. making purchase payments and accordingly certifies all papers to circuit court as an equitable matter for settlement."

There is nothing in the statutes providing for the certification by a justice of a case to the circuit court under the conditions existing in the case at the time it was transferred to that court by the justice. The justice had jurisdiction to hear and determine this re-

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plevin suit and he improperly certified it to the circuit court. This action of the justice did not confer jurisdiction of the subject-matter of the action on the circuit court, even though the parties appeared in the latter court and tried the case without any objection being made. [24 Cyc. 512; Verbeck v. Verbeck, 6 Wis. 157; Evans v. Phelps, 77 Iowa 526; Crismon v. Tufts, 3 Utah, 251; City of Kansas v. Ford, 99 Mo. 91; Whitehead v. Cole & Rodgers, 49 Mo. App. 428; Devore v. Staeckler, 49 Mo. App. 547; Moulder & Simpson v. Anderson, 63 Mo. App. 34; Green v. Castello, 35 Mo. App. 127; Garnet v. Rodgers, 52 Mo. 145; Hyatte v. Wheeler, 101 Mo. App. 357.]

The judgment is reversed and the cause remanded with directions to the trial court to strike the case from its docket for want of jurisdiction. All concur.

W. E. BIRMINGHAM, Respondent, v. ARCH CARR, Appellant.

Kansas City Court of Appeals, June 11, 1917.

1. **REPLEVIN: Agister's Lien: Instructions.** The plaintiff loaned one Armstrong a sum of money to settle two attachment suits, and took a mortgage on the horse which is the subject of this litigation. When the attachment suits were brought, the constable took charge of the horse under the writs and boarded the horse at the defendant's barn. After Armstrong settled the attachment suits and gave the mortgage on the horse, he made arrangements with the defendant, Carr, to board the horse. This was done several hours after the mortgage was executed. When the mortgage fell due the plaintiff demanded his horse or the money from Armstrong, and he was informed that the horse was located at Carr's barn. Carr refused to deliver up the horse claiming an agister's lien and the plaintiff instituted this suit in replevin against him. The issues were determined in favor of the plaintiff. *Held*, that an instruction given to the jury that while the horse was in the custody of the constable no lien accrued to the defendant for the keep of the horse during said time, was erroneous.

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2. ———: ———: ———. The lien of a mortgagee is superior to any agister's lien, if such lien is created prior to the placing of the horse with the agister and if the holder of the mortgage has in no way waived his right to priority.

3. ———: ———: ———. An agister who takes care of a horse under a contract with a bailee of the horse, and whom he knows to be in charge of the animal, as bailee, is bound to know the extent of the authority of such bailee, and he has no agister's lien as against the bailor.

4. ———: ———: **Constables.** It is the constable's duty under the law to take proper care of animals that are taken into his custody, and, if he does not do so he is liable, but it is not assumed that he will not place them in the custody of some one engaged in caring for like animals.

5. ———: ———: **Chattel Mortgages.** A chattel mortgage only becomes a lien on a horse as to third parties from the date that it is filed of record, and such mortgage must be recorded within a reasonable time after its execution.

Appeal from Gasconade Circuit Court.—*Hon. R. A. Breuer,* Judge.

REVERSED AND REMANDED.

N. J. White for appellant.

C. W. Baxter and *J. W. Hensley* for respondent.

BLAND, J.—On March 22, 1915, Dr. Samuel Armstrong was the owner of a certain horse which is the subject of this litigation, and on that day two attachment suits were filed against him and the constable on the same day seized said horse under said writs of attachment and placed the horse in a livery or feed stable owned by one Mathews. The constable continued to board said horse at Mathew's stable until the 1st day of April, 1915, when Mathews transferred the stable to defendant Carr, and on said day the constable arranged with said Carr to feed and care for the horse. On the 3rd day of April, 1915, trial was had of both of said attachment suits, resulting in a judgment against defendant in each case, and the constable continued in possession of said horse by virtue of said writs of at-

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tachment until the 13th day of April, 1915, when the property was released by a settlement between Armstrong and the attaching creditors, wherein Armstrong borrowed the sum of one hundred and seventy-five ($175) dollars from plaintiff, Birmingham, with which to settle said two attachment suits, and at the same time gave said Birmingham a mortgage on said horse to secure said sum of money, and thereupon said horse was released under said writs of attachment and Lafe Armstrong, a son of Dr. Armstrong, went to the livery stable, then owned by appellant Carr, and requested Carr to allow him to take the horse out of the stable. Some argument was had as to whether the property was yet in the custody of the constable and young Armstrong suggested to Mr. Carr that he call Birmingham on the phone and ascertain if the horse had been released under the attachment. Thereupon a telephone conversation took place between Carr and Birmingham in which Birmingham told Carr that the matter had been straightened up and for Carr to turn the horse over to young Armstrong. Birmingham claims that he also told Carr that he had a mortgage on the horse. Carr denies this. Later on, on the same day, being the 13th day of April, 1915, about an hour and a half after said telephone conversation between Birmingham and Carr, and several hours after the execution of the mortgage to Birmingham, Dr. Armstrong and his son came to Carr's barn and made a contract with Carr whereby the latter was to board and care for the horse.

About the 20th day of August, 1915, when the mortgage given by Dr. Armstrong to Birmingham had matured and Birmingham after a diligent search was unable to find Dr. Armstrong to collect the money owing to the former, he told young Lafe Armstrong that he wanted either the horse or the money and was informed by said Armstrong that the horse was at Carr's barn, whereupon Birmingham went to Carr's barn and demanded the horse under his mortgage. Carr refused to deliver the horse, claiming that he had

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an agister's lien upon it for his feed bill. Birmingham thereupon brought this replevin suit to recover possession of the horse.

The court instructed the jury that while the horse was in the custody of the constable from April 1, 1915, to April 13, 1915, that no lien accrued to the defendant for the keep of said horse during said period of time. Appellant claims that the court erred in so instructing the jury.

Unlike an artisan's common law lien an agister's lien, being of statutory creation and in derogation of the common law, must be strictly construed, and it has been often held that unlike an artisan's lien the lien of a mortgagee is superior to that of the agister if such lien was created prior to the placing of the horse with the agister, and if the holder of the mortgage has not in any way waived his right of priority. [Miller v. Crabbe, 66 Mo. App. 660; Lazarus v. Moran, 64 Mo. App. 239; Harding & Co. v. Kelso, 91 Mo. App. 607; Zartman-Thalman Carriage Co. v. Reid & Lowe, 99 Mo. App. 415.] And it is also held that an agister who takes care of a horse under a contract with a bailee of the horse, and whom he knows to be in charge of the animal as bailee, is bound to know the extent of the authority of such bailee and he has no agister's lien as against the bailor. [Sherwood v. Neal, 41 Mo. App. 416.]

However, the constable placed the horse in question in defendant's barn on April 1, 1915, to be fed, and Birmingham knew this when he took his mortgage on April 13, 1915, so that if the constable was able to create an agister's lien in favor of the livery stable man, such lien had priority over the lien of the mortgagee. However, it is strenuously insisted by the plaintiff that a constable could not create an agister's lien against the animal in the manner it is claimed it was created. Respondent cites no authorities to substantiate this claim but argues from the fact that the statute allows the constable compensation for the care and keep of animals in his custody under an attach-

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ment writ and permits the expense of such care to be taxed as costs in the suit, and requires plaintiff to give bond for costs, clearly shows that the Legislature did not intend that a livery-stable man should have an agister's lien against an animal placed in his stable by the constable. The constable's position in reference to his possession of the animal is entirely different from that of an ordinary bailee and therefore this case is to be distinguished from cases such as the one of Sherwood v. Neal, supra, wherein it was held that there was no agister's lien for the reason that the party boarding out the horse was a bailee and for that reason the owner of the horse presumed that he, the bailee, would take care of the horse instead of putting it in a livery stable.

It is the constable's duty under the law to take proper care of the animal and if he fails to use ordinary care so to do he is liable. [Murfree on Sheriffs, sec. 261a; Harlow's Sheriffs and Constables (2 Ed.), sec. 256.] But it is not to be assumed that he will not place it in the custody of someone engaged in caring for like animals.

The attached property being *in custodia legis,* the power of the constable in respect to it is not different from that of a receiver who has taken property into his possession under the order of court appointing him. As to a receiver's power to create liens it was said in Vette v. Leonori, 42 Mo. App. l. c. 225:

"It is said in Kneeland v. American Loan and Trust Co., 136 U. S. 89, that a court which appoints a receiver acquires, by virtue of that appointment, certain rights and assumes certain obligations, and that the expenses, which the court creates in discharge of those obligations, are necessarily burdens on the property taken possession of, and this irrespective of the question, who may be the ultimate owner, or who may have the preferred lien, or who may invoke the receivership." [See, also, Case Plow Works v. Union Iron Works, 56 Mo. App. 1.]

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We are, therefore, of the opinion that the constable created an agister's lien against the horse in favor of defendant.

The fact that the constable could have had the feed bill charged as costs in the case would not prevent an agister from securing his lien against the horse, as the agister should not be put to the hazard of a constable failing to see that the agister's bill was properly charged as costs and that the same was paid. The facts in this case show that the constable did not see that such bill was paid. The statute gives the agister a lien upon the horse for his feed and makes no exception in the attaching of this lien in cases where the feed might be paid by some other means.

However, if the horse being *in custodia legis* is placed in a livery barn and while so being is sold, the purchaser would take it, no doubt, discharged of the agister's lien; but the lien would, we think, be valid against the proceeds arising from the sale of the horse in the custody of the court, just as the sale of goods in the custody of the court is discharged of the lien of the warehouseman in whose place the goods have been stored by the constable (see Case Plow Works v. Union Iron Works, supra), but whether this be so or not, no such question arises here, because the horse was released from the custody of the law without sale, so that the only question really after all is whether the constable had the power to place the horse in the stable, which, as we have held, he did. We are, therefore, of the opinion that the defendant had a lien upon the horse from April 1, 1915, to April 13, 1915, and the court erred in instructing the jury otherwise.

Appellant urges that he had a lien after April 13, 1915, because he claims that plaintiff as a matter of law waived his prior lien as mortgagee. The evidence shows that the mortgage was made several hours before Dr. Armstrong and his son made the new contract with defendant for the keep of the horse after the settlement of the attachment suits. The defendant, having made a new contract with the owner of the horse

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for the horse's feeding, terminated his right to a further lien under his contract with the constable. As we have before stated, it has been often held that although the mortgagee's lien is superior to that of the agister, if it antedates that of the agister, nevertheless, such lien of the mortgagee may be waived by him in favor of an agister, and it is held in Miller v. Crebbe, supra, l. c. 662, "If, . . . the mortgagee may be presumed to have understood that the mortgagor would take them to a stable keeper to be boarded, and no objection was made, such consent should be implied, otherwise it should not. . . . The real question is, whether he (the mortgagee) has reason to believe, and does believe, that they (the horses) are to be boarded at a livery stable, or kept by anyone else than the mortgagor," but it is held in Lazarus v. Moran, supra, l. c. 241, "The purpose of a mortgage is to furnish security, and the property is usually left with the mortgagor for his convenience, with an understanding that nothing shall be done or permitted by him to impair the security. An agreement which will defeat the purpose of the transaction should not be inferred or implied against a mortgagee without very cogent evidence."

There is no evidence that plaintiff knew or understood that Dr. Armstrong intended keeping the horse in defendant's barn. The defendant claims that as a matter of law plaintiff waived his lien in favor of the agister for the reason that plaintiff knew that the horse was in defendant's barn at the time he had the telephone conversation with the defendant and knew that it had been there and had been fed by the defendant for sometime prior to the day of said conversation.

We do not think that these facts show as a matter of law that plaintiff waived his prior lien. While plaintiff might have known that the horse was being boarded by defendant under an arrangement with the constable, it cannot be presumed from these facts alone that Dr. Armstrong intended to board the horse with defendant, but, on the other hand, it was but natural that Dr. Arm-

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strong would have taken the horse away from the stable after the attachment suits were settled up; at least, there is no presumption that he would leave it there.

The court properly submitted all these facts to the jury and left it to them to decide whether plaintiff had waived his prior lien, and as we cannot say as a matter of law that plaintiff did waive it, the finding of the jury on the question is conclusive.

It appears that the chattel mortgage from Dr. Armstrong to plaintiff was not recorded until the day after it was executed and, consequently, after the new contract between Dr. Armstrong and his son and defendant for the keep of the horse, made after the settlement of the attachment suits. The mortgage only became a lien on the horse, as to third parties, from the date that it was filed for record. [Sec. 2861, R. S. 1909; Stone v. Kelley and Son, 59 Mo. App. l. c. 217, 218.] Therefore, defendant's lien created by the new contract with Dr. Armstrong and the latter's son and defendant for the keep of the horse created a prior lien to that of plaintiff's unless plaintiff recorded his mortgage within a reasonable time. [Bryson and Hardin v. Penix, 18 Mo. 13; Way v. Braley, 44 Mo. App. 457.] As the town of Bland, where the mortgage was executed, is several miles from the county seat of Gasconade County, the question of whether plaintiff recorded his mortgage within a reasonable time, no doubt, will be thrashed out in the trial anew.

The judgment is reversed and the cause remanded. All concur.

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CHARLES C. YOUNG, et al., Appellants, v. CONSOLIDATED SCHOOL DISTRICT NO. 3 et al., Respondents.

Springfield Court of Appeals, June 23, 1917.

SCHOOLS AND SCHOOL DISTRICTS: Power of Board to Select Site for High School: Statute. Under the provisions of the Buford Rural High School Law (Laws 1913, p. 721)—referring to article 4, chapter 106, R. S. 1909,—a school board of a consolidated school district has power to select and acquire a site for a high school, the designation of a site by the voters being considered largely advisory.

Appeal from Greene County Circuit Court.—*Hon. Arch A. Johnson*, Judge.

AFFIRMED.

Hamlin, Collins & Hamlin for appellants.

George W. Good and *John Schmook* for respondents.

STURGIS, J.—The plaintiffs, as tax payers of the defendant school district, brought this suit by injunction to restrain the defendants, composing the school board of such district, from building a school house for a high school on what is termed the Kime site, the contention being that another site, known as the Appleby site, had been lawfully selected by the voters of the district and that defendants have no power to build elsewhere. It is conceded that the defendant school district is lawfully organized as a consolidated school district under the Act of 1913, Laws 1913, page 721, relating to consolidated school districts, and has provided the funds necessary to construct the high school building.

The real question at issue is whether in such school districts the power to select the site for the high school is vested in the school board or in the voters

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of the district at an election held for that purpose. According to the agreed facts an election was duly held in such district at which the voters voted on the question of selecting a site for the central high school. Three cites were mentioned in the notices and voted on at such election, the Appleby site receiving a majority of the votes cast and the Kime site being a close second. It appears, however, that the notices calling the election misdescribed the Appleby site as known and understood by the voters, and in fact described a tract located one-fourth mile from the site as understood by the voters to be the Appleby site. On account of this complication the board of directors determined to acquire and build the high school on the Kime site and at a meeting of the board action to that effect was duly taken. This suit was then instituted to restrain the school board from so doing and on a hearing the trial court rendered judgment dismissing plaintiffs' bill, from which they have appealed.

The Acts of 1913 in question, known as the Buford Rural High Schools Law, provides that when a consolidated school district is formed "all the laws applicable to the organization and government of town and city school districts as provided in article IV, chapter 106 of the Revised Statutes of Missouri, 1909, shall be applicable to districts organized under the provisions of this act." At the same session of the Legislature Acts 1913, page 720, section 10871, being one of the sections of article IV of chapter 106 above referred to, was re-enacted so as to make certain changes not material here and provides: "The board of education of any town, city or consolidated school district shall, except as herein provided, perform the same duties and be subject to the same restrictions and liabilities as the boards of other school districts acting under the general school laws of this State.

The method of selecting sites for new school houses in consolidated school districts is therefore the same as that provided by article IV, chapter 106, Revised Statutes 1909, relating to city and town schools and such

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chapter is headed: "Laws applicable to city, town and consolidated schools." The section of that article and chapter relating to selecting and procuring sites and erecting schoolhouses thereon in city and town schools is section 10869, and provides: "When the demands of the district require more than one public school building therein, the board shall, as soon as sufficient funds have been provided therefor, establish an adequate number of primary or ward schools, corresponding in grade to those of other public school districts, and for this purpose the board shall divide the school district into school wards and fix the boundaries thereof, and the *board* shall *select and procure* a site in each newly formed ward, and erect a suitable school building thereon and furnish the same; and the board may also *establish* schools of a higher grade, in which studies not enumerated in section 10941 may be pursued."

The plaintiffs concede, as we understand, that so far as ward or primary schools are concerned the statute gives the school board and not the voters the power and authority to "select and procure a site" in each ward and erect buildings thereon; but plaintiffs contend that the power there given to "establish schools of a higher grade" does not include the selection of a site for such higher school. In view of the fact that there is no provision made in the article relating to town, city and consolidated schools for the voters to select the site of the schools of a higher grade, we think this construction of section 10869, supra, is too narrow. The Supreme Court, in State ex rel. v. Jones, 155 Mo. 570, 576, 56 S. W. 307, after referring to this section, there mentioned as section 8088, Revised Statutes 1889, and the establishment of high schools thereunder, said: "The statute vests in the qualified voters of the district of country districts, and in the directors of the city districts, full and complete discretion as to the location of the school houses (secs. 7979, 8001 and 8085, R. S. 1889)." The sections there referred to are now sec-

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tions 10845, 10792 and 10866, Revised Statutes 1909. Of these sections so referred to by the Supreme Court as conferring power upon the board of directors in city, town and consolidated schools to select school sites, section 10866 is part of the article on such kind of schools and vests the government and control of same in the board of education of six members. Section 10792 is part of the article of the same chapter applicable to all schools and provides for the condemnation of sites when selected and no agreement is reached with the owner as to the price. It is significant that this section was amended in 1913, Acts 1913, page 713, by adding the words printed in italics so as to read: "Whenever any district shall select, at the annual or any special meeting, one or more sites for one or more school houses, *or the board of education in city, town or consolidated school districts, under the provisions of the statute applicable thereto, shall locate, direct and authorize the purchase of sites for school houses, libraries, offices, and public parks and play grounds,* and cannot agree with the owner thereof as to the price to be paid for the same, or for any other cause cannot secure a title thereto, the board of directors or board of education aforesaid may proceed to condemn the same in the same manner as provided for condemnation of right of way," etc. This plainly implies the right of the school board, and not the voters, to select all new school house sites in city, town and consolidated districts. In Martin v. Bennett, 139 Mo. App. 237, 245, 122 S. W. 779, the court used this language with reference to locating high schools in consolidated districts: "I think also that the authority to establish a high school carries with it the authority to provide a home for the school and to erect a building for the purpose on ground owned or to be acquired by the district"

The case of Buchanan v. School District, 25 Mo. App. 85, is cited as holding that in city, town or consolidated schools the same as in country schools, "not

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the directors but the entire corporate body is constituted the judge of the necessity or propriety of changing the school site." That case was written when section 7146, Revised Statutes 1879, was in force and before that section was amended so as to confer on the board of directors the power now contained in section 10869, supra, to select and procure school sites. What is said in Richardson v. McReynolds, 114 Mo. 641, 646, 21 S. W. 901, about the power of the voters only to change a school site has reference to a country school district only. Moreover, the present case does not involve the power of the board of directors to change a school house site whereon a school has been previously maintained.

We hold, therefore, that the school board of the defendant district was vested with power to select and acquire a site on which to erect the high school provided for; that the designation of the Appleby site by the voters was largely advisory and, since that site was in fact never acquired by the school district, the board of directors did not abuse or exceed its powers in selecting and proceeding to acquire the Kime site and the erection of the high school thereon.

The judgment will, therefore, be affirmed. *Cox, P. J.*, and *Farrington, J.*, concur.

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J. P. EAVES, Respondent, v. J. W. KEETON, Appellant.

Springfield Court of Appeals, June 23, 1917.

1. **BILLS AND NOTES: Certificate of Protest by Notary.** The certificate of protest of an inland bill of exchange or note by a notary public establishes prima-facie proof of demand, refusal of payment and notice of dishonor necessary to fix the liability of the indorsers on a note. (Sections 6329, 10053, 10059, 10088, R. S. 1909.)

2. ———: ———. Formal protest by a notary, or other officer, of the dishonor of any negotiable instrument other than a foreign bill of exchange is not required under the Negotiable Instruments Act (Sec. 10088, R. S. 1909), yet same may be protested for non-payment and when so protested the notary's certificate is admissible and constitutes prima-facie evidence.

3. ———: **Proof of Demand and Notice of Dishonor.** As to an inland bill or note demand of payment and notice of dishonor may be made by any one and the proof thereof may be made by oral or any competent evidence, regardless of formal protest.

4. ———: **Notary's Certificate of Protest: Not Filed in Justice Court: Receivable in Circuit Court.** Action on a promissory note begun in justice court. The Notary's certificate of protest was not filed in that court but was first filed in the circuit after appeal to that court. Since trial in circuit court is *de novo* such certificate may be received in evidence when filed fifteen days before trial in that court and is not excluded by sec. 6329, R. S. 1909, requiring the certificate to be filed at least fifteen days before trial.

5. ———: **Notice of Dishonor: What Sufficient.** The statute is complied with regarding notice of dishonor of a note (sec. 10075, R. S. 1909) when it is shown that notice was duly mailed, addressed to defendant, at his proper post office address, regardless of miscarriage in the mails.

6. ———: **Indorsers: Order of Liability.** Indorsers, in respect to one another are prima-facie liable in the order in which they endorse. (Sec. 10038, R. S., 1909.) But evidence is admissible to show that they have agreed otherwise among themselves.

7. ———: **Indorser: When One Considered.** One who places his signature on a note otherwise than as maker, drawer or acceptor, is deemed an indorser unless he clearly indicates, by appropriate words, his intention to be bound in some other capacity. (Sec. 10033, R. S. 1909.)

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8. ———: **Indorsement in Blank: Not to be Changed by Parol Evidence.** Where one indorses a note in blank he cannot by parol evidence show that he signed merely as an agent for a prior party and was not individually liable.

9. ———: **Indorser's Address: Placed on Note: Notice Sent to.** Where an indorser places his post office address on the note and notice of dishonor is sent to such party at that address, this, under the statute is sufficient. (Sec. 10078, R. S. 1909.)

10. ———: **Joint Indorsers: Liability.** One joint indorser who receives notice of the dishonor of a negotiable instrument is not discharged because of a failure to notify another joint indorser.

11. ———: **Several Indorsers: What Notice Establishes Liability.** When there are successive indorsers, in order to hold any one of them liable it is not necessary to give notice to prior indorsers, notice to the last indorser being sufficient to hold him.

12. ———: **Joint Indorsers: Liability.** Joint payees and indorsers who indorse are deemed to indorse jointly and severally.

13. ———: **Notice of Prior Dishonor: Antecedent Parties.** Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after dishonor. (Sec. 10077, R. S. 1909.)

14. ———: **Liability of Indorser: Prior Indorsers.** Any indorser to whom notice of dishonor is not given by the holder is discharged so far as such holder is concerned, but the party who is notified is thereby made liable to the holder and is given the right to protect himself by giving notice to those parties to the note from whom, on his paying the instrument, he is entitled to reimbursement.

15. ———: **Liability of Indorser: Accommodattion Indorser.** An indorser on a note cannot escape liability by showing that he received none of the proceeds and acted merely for the accommodation of one who desired to negotiate it. (Sec. 10000, R. S. 1909.) The holder parts with a consideration in the payment on the faith of the signatures thereto and that is sufficient consideration.

Appeal from Dent County Circuit Court.—*Hon. L. B. Woodside,* Judge.

AFFIRMED.

G. C. Dalton and *W. P. Elmer* for appellant.

Lorts & Breuer for respondent.

STURGIS, J.—This suit on a promissory note involves the right of the holder to have judgment against

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the appealing defendant, J. W. Keeton, as endorser. When we speak of defendant we mean J. W. Keeton, unless otherwise indicated. The record discloses that one Claud Wood is the maker of the note and Joseph E. Burgess is the payee. Such payee sold or traded the note to W. R. Keeton for a team of mules at or about the time of its date and endorsed the same in blank by writing his name on the back of such note. Shortly thereafter the defendant, J. W. Keeton, father of W. R. Keeton, having the note in his possession, offered it for sale to the plaintiff, who, after some investigation, agreed to buy it at a discount sufficient to make the interest equal eight per cent. instead of seven per cent., as specified in the note. The plaintiff testified that he agreed to buy the note on condition that both J. W. and W. R. Keeton endorse it and that thereupon J. W. Keeton first endorsed the name of W. R. Keeton under that of Burgess on the back of the note and then endorsed his own name under that of both such parties. The defendant, J. W. Keeton, says that his son, W. R. Keeton, had already endorsed the note and sent it to him to sell to plaintiff. Defendant cannot object to our accepting his statement as being correct. He, however, claims that he was acting merely as agent for his son in selling the note and endorsed it at plaintiff's request merely to show from whom plaintiff obtained the note. In any event J. W. Keeton wrote his name across the back of the note under and after the other endorsers' names were written thereon. He then delivered the note to plaintiff and plaintiff paid him the purchase price. It also clearly appears that plaintiff deducted from the price of the note a sum sufficient to make the interest equal eight per cent.

A part payment was made on the note by someone other than defendant and the balance not being paid when due, the plaintiff's evidence shows that he caused the same to be presented for payment at the bank where the note was made payable and payment was refused; that he caused notice of the dishonor to be mailed to the endorsers and had the note formally protested.

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Plaintiff's proof of these facts consisted of the notary's certificate of protest which was offered and received in evidence. Our statute section 6329, Revised Statutes 1909, makes such certificate prima-facie evidence of the facts therein stated as to demand and refusal of payment and notice of dishonor to the parties to the note. [Faulkner v. Faulkner, 73 Mo. 327.] While the Negotiable Instruments Act (section 10088, Revised Statutes 1909), provides that formal protest by a notary, or other officer, of the dishonor of any negotiable instrument, other than a foreign bill of exchange, is not required, yet same may be protested for non-payment and when so protested, the notary's certificate is admissible and constitutes prima-facie evidence. Proof of demand and refusal of payment and notice of dishonor are necessary to fix the liability of endorsers. [Secs. 10053 and 10059, R. S. 1909; Nevius v. Moore, 221 Mo. 330, 353, 120 S. W. 43.] The demand of payment and notice of dishonor may be performed by anyone and the proof thereof be made by oral or any competent evidence regardless of any formal protest. The point made is that only when protest is required is the notary's certificate receivable in evidence as such proof. This, however, is not tenable. Section 6329, supra, has no such limitation but applies to all cases where notes are in fact protested. [First National Bank v. Hatch, 73 Mo. 13. 22.]

The statute last mentioned requires that such notary's certificate, in order to be receivable in evidence, must be filed in the cause fifteen days before the trial. This cause originated in a justice court and such certificate was first filed in the circuit court after the appeal to that court. It is suggested that in order to comply with the statute such certificate must have been filed in the justice court before trial there. The trial in the circuit court, however, is *de novo* and as this requirement relates merely to the competency of the evidence when offered and is merely to give the opposite party an opportunity to inquire into the truth of

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the facts, no argument is necessary to refute this contention. [First National Bank v. Korn, 179 S. W. 721.]

Certain criticisms of the notary's certificate as being deficient in certain particulars are noted, but we find same to be without merit and merely refer to Pier v. Heinrichshoffen, 67 Mo. 163; Rolla Bank v. Pezolt, 95 Mo. App. 404, 411, 69 S. W. 51.

In rebuttal of the prima-facie case made by the notary's certificate, the defendant testified that no notice of the note's dishonor was received by him. It was shown, however, that soon thereafter he wrote to the notary who sent out the notice asking him to see plaintiff and get him not to sue but to indulge the parties longer for the reason that he, defendant, did not want to have to pay it; that plaintiff ought to do this for him. All that the law requires is that the notice, properly addressed, be mailed to the party entitled to receive it and any failure of the mail to deliver same makes no difference. [Sec. 10075, R. S. 1909; First National Bank v. Korn, 179 S. W. 721.] Under the instructions given, the jury were required to find and did find that notice of the note's dishonor was mailed to defendant at his proper post office address and such finding is conclusive.

The defendant insists that his and W. R. Keeton's endorsements were made at the same time and for the same purpose and therefore they must be considered joint endorsers. This ignores the positive testimony of defendant himself that his son, W. R. Keeton, had previously endorsed the note in blank and delivered it to him to negotiate and that his own endorsement was made on delivering the note to plaintiff. Moreover, we have a statute fixing the prima-facie liability of endorsers in the order in which they endorsed. [Sec. 10038, R. S. 1909.] Such was the law also before the adoption of the Negotiable Instruments Act in the absence of a contract to the contrary. [McNeilly v. Patchin, 23 Mo. 40; McCune v. Belt, 45 Mo. 174.]

The defendant's real claim, however, is not that by contract with each other he and his son, W. R.

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Keeton, were to be joint endorsers, but that he was not to incur any liability whatever, being merely agent for his son. Such, however, is not his written contract, since he signed this note as an endorser without indicating his intention not to be so bound. Section 10033, Revised Statutes 1909, provides: "A person placing his signature upon an instrument otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." This statute declares the legal effect of such blank endorsement and such effect cannot be changed or varied by parol evidence. [First Nat. Bank v. Korn, 179 S. W. 721, and cases cited; Houser v. Fayssoux (N. C.), 83 S. E. 692.]

But granting that the two Keetons are joint endorsers of this note, such fact would not aid this defendant. It is true that under an erroneous instruction, the jury found that W. R. Keeton was not liable to plaintiff because no notice of the note's dishonor was given him. This instruction is erroneous because it told the jury that the mailing of the notice of dishonor to W. R. Keeton at a post office address other than his true post office address would not be sufficient to hold him as an endorser. W. R. Keeton's endorsement on this note gave his post office address and the notice was mailed to him at such address. This, under the statute, is sufficient. [Sec. 10078, R. S. 1909.]

The law, as declared by the Negotiable Instruments Act, does not discharge one joint endorser who receives due notice of the dishonor of the negotiable instrument because of a failure to notify another joint endorser. Such was the law in this State prior to the adoption of that Act, on the theory that the contract of joint endorsers was joint and not several. [Northrup v. Chambers, 90 Mo. App. 61.] It has always been the law in this State that, when there are successive endorsers, in order to hold any endorser liable it is not necessary to give notice to a prior endorser, but notice to the last endorser only is sufficient to hold him. [Rolla Bank v. Peholz, 95 Mo. 404, 411, 69 S. W. 51; First

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National Bank v. Hatch, 78 Mo. 13, 24; 9 Cyc. 1067; 4 Enc. Law (2 Ed.), 339.] Section 10038 of the Negotiable Instruments Act provides: "Joint payees or joint endorsees who endorse are deemed to endorse jointly and severally." Section 10077 provides: "Where the party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor." This is a direct legislative declaration that the endorsement of joint endorsees shall be deemed a several endorsement and makes provision by which each and any endorser, when notified of the dishonor, may himself take steps to hold any other party who may properly be liable to or with him. Moreover, section 10059 of this same act provides: "Except as herein otherwise provided, when a negotiable instrument has been dishonored by nonacceptance or nonpayment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged." And this is followed by section 10060 as follows: "The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given." According to these statutory provisions any endorser to whom notice of dishonor is not given by the holder is discharged so far as such holder is concerned, but the party who is notified is hereby made liable to the holder and is given the right to protect himself by giving notice to those parties to the note from whom, on his paying the instrument, he is entitled to reimbursement. In other words the same rule as heretofore applied to successive endorsers of notes or bills of exchange is now, by the Negotiable Instruments Act, made applicable to joint endorsers. Such is the holding in Williams v. Bank (Ky.), 137 S. W. 535, 25 Ann. Cas. 530, in construing the same sections of that act, from which opinion we quote: "Under the act the holder may give notice of dishonor

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to the indorser, to whom it desires to look for the payment of the money, and it is then incumbent upon him within the time specified in the act after he received the notice from the holder to give notice to those to whom he may wish to look for reimbursement. . . . The operation of section 107 (sec. 10077, R. S. 1909), is not confined to those who are antecedent in liability as to the whole of the debt; but it applies to all who are antecedent as to any part of it. The indorsers know their relation to each other better than the holder, and the purpose of the act is to provide a uniform rule which the holder may follow in all cases as the rule was applied in the case of successive indorsers at common law." [See 8 C. J. 644.]

Something is said as to there being no consideration for the endorsement of the note by defendant and that such failure of consideration defeats his liability. Granting that said defendant had no interest in the note and received nothing for his endorsement, defendant's contention shows a misconception of what constitutes a consideration. An accommodation party to a note never has an interest in the obligation he signs and he receives no consideration for so doing. The holder, however, parts with a consideration on the faith of the signatures thereto, and that is a sufficient consideration. Section 10,000, Revised Statutes 1909, provides: "An accommodation party is one who has signed the instrument as a maker, drawer, acceptor, or endorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

What we have said sufficiently answers the contention that the court erred in giving and refusing instructions. The case was properly tried and the judgment is affirmed. *Cox, P. J.*, and *Farrington, J.*, concur.

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SPRINGFIELD PLANING MILL, LUMBER AND CONSTRUCTION COMPANY, Respondent, v. EHART H. KREBS and EVA KREBS, Appellants, LAND SECURITY COMPANY, JOE KREBS, JOHN RAGSDALE, W. H. HORINE, E. D. MERRITT, and LULA C. SHEPPARD, Defendants.

Springfield Court of Appeals, June 23, 1917.

1. **MECHANICS LIENS: Material Furnished: Statutory Rights.** A materialman who has furnished material which was used to build defendant's house may, by complying with the provisions of sec. 8217, R. S. 1909, compel defendants to pay out of such property the debt or such part of it as represents the reasonable value of the material furnished. And this is true although the land owners may have paid the contractor all that was due.

2. ———: **Requirements of Statute: Must Be Complied With.** The Mechanics Lien statute is to be liberally construed, yet the rights thereunder are wholly statutory and depend on a compliance with the terms imposed by the statute which create them. And to avail one's self of the benefits conferred by the statute one must comply with the substantial requirements of same.

3. ———: **When Statement Sufficient.** A lien statement filed under the Mechanics Lien statute which is as definite as the contract under which the material was furnished or the labor done, will generally satisfy the requirements of sec. 8217, R. S. 1909.

4. ———: **When Statement Not Sufficient.** A statement of lumber and mill work filed under the Mechanics Lien statute giving the amount due with no other description of the material furnished and work done than "lumber and mill work as per estimates," where such estimates are not in substance incorporated in the statement, is not sufficient.

Appeal from Greene County Circuit Court.—*Hon. Guy D. Kirby,* Judge.

REVERSED AND REMANDED (*with directions*).

Lewis Luster for appellants.

Patterson & Patterson for respondents.

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STURGIS, J.—Suit to enforce a mechanic's lien. Plaintiff is a sub-contractor and materialman furnishing the lumber, mill work, etc., which entered into the buildings. The defendants Krebs and wife are the owners of the premises, and defendant John Ragsdale is the contractor. The other defendants are interested as trustees and beneficiaries of certain deeds of trust on such premises. The trial court sustained the lien renering judgment in the sum of $419.57 and the landowners only, Krebs and wife, have appealed. When speaking of defendants we mean such landowners. The contractor, Ragsdale, was served by publication, made no appearance and hence no personal judgment was rendered against him.

The evidence shows that the defendants Krebs and wife, being the owners of a certain lot in Springfield, Missouri, made a contract with defendant Ragsdale to furnish all the material, labor, etc., and build for them thereon a house and barn according to certain plans and specifications for the price and sum of $2200. The contract was for the completed buildings at this price. The contractor, Ragsdale, thereupon made out two itemized estimates, the one for the lumber necessary to erect the house and the other for the mill work. These estimates he submitted to plaintiff for prices and the plaintiff agreed to furnish the lumber as per estimate for $425 and the mill work for $440. The evidence shows that the estimate for the lumber, speaking generally, included such building material of that character as is commonly kept in stock ready for use—the standard kinds and dimensions. The estimate for mill work included such building material of the same character as required some work in preparing or fitting it for use—doors, windows, stair cases, etc. It is also shown that some items might be placed on either of such estimates indiscriminately, depending upon whether same were kept in stock or had to be made or whether the contractor wanted same finished or fitted for use or the material furnished and the fitting and finishing done

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by the contractor. Most items would clearly belong to the one class or the other, but some items might be classed by the contractor as lumber or as mill work according to his notion or convenience. The point is that even a person who is familiar with that business could not tell by looking at the completed building or what went into it just what items may have been furnished as lumber and what as mill work. This we think will be found to be of no very great importance in the present case, as doubtless it made little difference in the cost whether such items were furnished as lumber or mill work. It might make considerable difference, however, had the sub-contracts been let to different persons.

The evidence, we think, is sufficient to show that plaintiff furnished all the material covered by these two estimates and substantially all of same was used by the contractor in the construction of the building. Some small changes were made in the items of these estimates after they were first submitted to plaintiff, but the lien claim is based on the estimates as finally agreed to. It appears, however, that the lumber used in constructing the barn, a small structure, was not included in these estimates but was furnished by plaintiff, amounting to $53.50. The items of this are set out in the lien claim. The plaintiff also furnished the contractor considerable other building material, cement, chats, sand, extra lumber, etc., itemized in the lien account, amounting to $190.22.

The serious matter for our consideration is the sufficiency of plaintiff's lien claim filed in pursuance of section 8217, Revised Statutes 1909, relating to mechanics liens and on which this suit is based. This lien statement, after reciting that plaintiff furnished the materials mentioned in its account under contract with John Ragsdale, contractor, and describing the property on which the buildings and improvements were erected and the ownership of same by Krebs and wife, then sets out its account, two items of which are as follows:

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"3-21-15 Lbr per estimate No. 264 ..... $425.00
"3-22-15 Mill work estimate No. 44 on bungalow $440.00"

The defendants contend that these so called items are wholly insufficient to comply with the statutory requirements giving the plaintiff a right to have same declared a lien on their property.

On the facts stated we must, under the frequent rulings of our courts, sustain defendants' contention. No contractual relation exists between plaintiff, a subcontractor, and the defendant landowners. Defendants have never agreed to pay plaintiff anything and owe it nothing. It is only by force of our mechanics lien statute that plaintiff had a right to subject defendants' property to the payment of the debt which the contractor, Ragsdale, owes the plaintiff. Having furnished the material which went to build defendants' house the plaintiff, by complying with the provisions of the statute, can compel the defendants to pay out of their property this debt, or such part of it as represents the reasonable value of the material so furnished. [Grace v. Nesbit, 109 Mo. 9, 18, 18 S. W. 1118.] And this is true although such landowners have paid to the contractor all that is due. The mechanics lien statute giving contractors, sub-contractors, materialmen and laborers this extraordinary remedy is just in principle and is to be liberally construed, but the rights conferred are statutory and depend on a compliance with the terms imposed by the statute giving such rights. To avail himself of the benefits conferred by this statute the plaintiff must comply with the substantial requirements of same. One such requirement is that the lien statement required to be filed must contain "a just and true account of the demand due him after all just credits have been given." The Supreme Court, in Rude v. Mitchell, 97 Mo. 365, 11 S. W. 225, said: "These liens are creatures of the statute and the lienor must make and file an account which is a fair and substantial compliance with the law. If he fails to do this he has no lien for the materials and work not thus specified."

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[Mining Co. v. Coyne, 164 Mo. App. 492, 509, 147 S. W. 148; Foster v. Wulfing, 20 Mo. App. 90.]

What is a just and true account as required by the statute has been frequently adjudicated. The general rule requires the account to be fairly itemized; but to what extent depends somewhat on circumstances. It largely depends on the contract with the lien claimant under which the indebtedness arose. It will generally be found sufficient if the lien account filed is as definite and specific as the contract under which the labor or material or both were furnished. [Kern v. Pfaff, 44 Mo. App. 29, 34.] If the landowner is given by the lien account the same data as was furnished the sub-contractor or materialman in fixing the price which he charged or contracted for together with such price, the account will generally be fair and just. This information as to what material, the quantity and kind, was furnished by the party seeking the lien and the price or prices charged or contracted for must be shown by the lien account and it will not suffice to refer the landowner to some outside contract, statement or estimate which may or may not be known or accessible to such landowner. The Supreme Court, in Rude v. Mitchell, 97 Mo. 365, 373, 11 S. W. 225, stated the law thus: "Many things are often included in these building contracts for which the law gives no lien; and when it calls for a just and true account, it means a fairly itemized account showing what the materials are, and the work that was done, and the price charged, so that it can be seen from the face of the account that the law gives a lien therefor. A lumping item of the whole contract price on the one hand and the credits on the other is no compliance with the law at all. The account should be complete on its face, and a reference to plans and specifications for the work done and the materials furnished is a worthless reference and adds nothing to the statement." In Grace v. Nesbit, 109 Mo. 9, 19, 18 S. W. 1118, after quoting and approving the above statement of the law, the court added: "We understand from this opinion (which is given entirely upon the

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item of account filed in that case), that the account must show what the materials were, what work was done, and the prices charged. In other words the statute requires more than merely 'giving a lumping item of the whole contract price.' It requires a specification of the work done or material furnished, so that it can be seen from the face of the account that the law gives a lien therefor and that the owner can investigate the reasonableness of the charges. If a lumping price was agreed upon between the parties, no other price could have been specified so that the account would have been 'just and *true*.'"

The reason for requiring a lien statement to contain a just and true account is that the landowner may have therefrom what materials the lien claimant claims to have furnished and what prices he charged therefor so that such landowner may investigate whether such material went into his building and is lienable and the reasonableness of the amount charged. It will be seen that a lien statement which is as definite as the contract under which the material was furnished or labor done will, generally at least, supply this information. Thus in Grace v. Nesbit, 109 Mo. 9, 17, 18 S. W. 1118, the law is thus stated by McFARLAND, J.: "The purpose of the statute in requiring an account of the demand due to be filed was evidently to advise the owner, as well as creditors and purchasers, of the amount of the lien claimed against the property; that the correctness and justice of the demand might be investigated; and that the owner might be able to retain from the contractor enough of the contract price to discharge the claim. It is evident that when the demand claimed to be due, after allowing all just credits, is given, and the items of materials furnished are set out sufficiently in detail to allow an investigation of the reasonableness of the charges made, and to indicate whether the account is for materials for which the statute gives a lien, the purpose of the statute, in respect to the substance of the account, has been substantially complied with." In Lumber Co. v. Stoddard Co., 113 Mo. App. 306, 319-

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320, 88 S. W. 774, the court said: "The principal facts to be shown by a lien statement are what material or work the claimant wishes a lien for and when the indebtedness accrued. Such a showing enables the owner of the premises to ascertain whether the work or material actually went into the improvement and whether the statement was filed in the time limited. By ascertaining the truth about these matters, the owner will know that his property is or is not liable, prima facie. for the claim." And it was there held that the dates of the particular items are not essential where it is shown that the indebtedness accrued within the requisite period before the filing of the lien statement. On this point see also Mitchell Planing Co. v. Allison, 138 Mo. 50, 40 S. W. 118.

In Kling v. Railway Construction Co. of Carondolet, 7 Mo. App. 419, the court, in holding the lien bad because the lien statement was not itemized, said: "The contractor cannot bind the building for more than the materials furnished on the credit of the building are fairly worth, and it is therefore important that the owner should be informed as to the particulars of the demand, that he may inquire as to the justice of the claim."

In Busse v. Fette, 55 Mo. App. 453, 457, the St. Louis Court of Appeals said: "The object of the statute, which requires an itemized statement of the account, is to notify the owner, and other parties interested in the property sought to be charged with the lien, of the nature of the work and the amount of the claim, to enable them to inquire into the validity of the claim as an encumbrance." [See, also, Lewis v. Cutter, 6 Mo. App. 54; Cahill v. Orphan School, 63 Mo. App. 28; Kearney v. Wurdman, 33 Mo. App. 455.]

Where it is also shown that the materialmen or subcontractors, as was the case here, contracted to furnish a large amount of specified material for a lump sum it will be sufficient to follow the contract in making out the lien account and give the lump price, together with the items and specifications of the materials furnished.

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Had this plaintiff set out in his lien account the items and specifications of the lumber and mill work substantially as contained in the estimates submitted to it by plaintiff with the lump price of the articles in each such estimate, the lien claim would be sufficient. [Heating & Plumbing Co. v. Construction Co., 187 Mo. App. 584, 589, 174 S. W. 161; Grace v. Nesbit, 109 Mo. 9, 17, 18 S. W. 1118.] So in Planing Mill Co. v. Allison, 138 Mo. 50, 58, 40 S. W. 118, the court ruled: "If the contract of the sub-contractor was to supply for the building a certain group of articles, for a certain price, there is no valid objection to his *reciting these articles* and then stating that one price in his claim, as was done in the case at bar. [Grace v. Nesbit (1892), 109 Mo. 9, 18 S. W. 1118; Deardorff v. Roy (1892), 50 Mo. App. 70; Sosman v. Conlon (1894), 57 Mo. App. 25.] That price is prima facie the reasonable value of the articles. [Hilliker v. Francisco (1877), 65 Mo. 598.]" In the recent case of Baker v. Smallwood, 161 Mo. App. 257, 259, 143 S. W. 518, the court, speaking of an account where, as here, both the materials furnished and the price charged were lumped (and reference made to a contract) the court, holding such lien statement insufficient, said: "The rule is well settled that notwithstanding the sub-contractor's agreement with the contractor fixed his compensation at a lump sum, to be entitled to a lien, the account filed by him must be *fairly itemized* to constitute it 'a just and true account within the meaning of the statute. [McWilliams v. Allen, 45 Mo. 573; Lewis v. Cutter, 6 Mo. App. 54; Kling v. Construction Co., 7 Mo. App. 411; Foster v. Wulfing, 20 Mo. App. 85; Graves v. Pierce, 53 Mo. App. 285; Rude v. Mitchell, 97 Mo. 372; Cahill v. Orphan School, 63 Mo. App. 28; Grace v. Nesbit, 109 Mo. 9.]"

The materials furnished by plaintiff, the lumber and mill work, could have easily been fairly itemized so as to intelligently show what lumber and mill work were furnished, as is demonstrated by the fact that the plaintiff had before it, when bidding on the same, an

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itemized statement or estimate, as it is called, showing the various amounts, kinds and dimensions of the lumber required and like particulars as to the mill work. This case, therefore, does not belong to the class of cases where it can be said that the items, though somewhat general and relating to the finished work rather than the particular ingredients or elements entering into the house, are yet as specific as the usages of the trade require and are sufficient to give the landowner all the information necessary to investigate and determine the reasonableness of the charges and whether the materials and work are lienable. Such are the cases of McDermott v. Class, 104 Mo. 14, 23, 15 S. W. 995; Walden v. Robertson, 120 Mo. 38, 44, 25 S. W. 349; Holland c. Cunliff, 96 Mo. App. 67, 80, 69 S. W. 737.

The case of Hilliker v. Francisco, 65 Mo. 598 comes nearer than any we have found in sustaining plaintiff's position. That case has not been overruled, but has been limited to the specific facts there appearing and in the later case of Rude v. Mitchell, 97 Mo. 365, 373. 11 S. W. 225, the court said it "goes to the verge of the law." This last case pointed out that the items in dispute in the Hilliker case "related to the stone work and labor of setting only and the price is given," thus putting it in the class of cases last cited. It should also be noted in the Hilliker case that the landowner had agreed with the contractor as to the compensation to be paid for the labor and material embraced in that item, thus making him, in effect, a party to the subcontract. The case of Mahan v. Brinell, 94 Mo. App. 165, 67 S. W. 930, follows the Hilliker case and the items and specifications contained in the lien statement for a lump job are apparently as detailed and specific as in the contract under which they were furnished and the principle is applied that "When the lien is filed by the original contractor, who has specifically agreed with the owner to do the job for a certain price, it seems a detailed statement of the items of material and labor that entered into the improvement is not required; presumably because the owner knew what he

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bargained for when he agreed on a price and does not need to be appraised of the basis of the charge by an enumeration of items." The same may also be said of the case of McMillan & Parker v. Ball & Gunning Co., 190 Mo. App. 340, 350, 177 S. W. 315, decided by this court, where the account, in accordance with the contract, gave a lump sum for furnishing the materials and doing the work of constructing wheat tanks of given dimensions "to be built and constructed of sand, chat, cement and reinforced with iron rods and wires." That case has been certified to the Supreme Court and not yet decided there. The language used in any opinion must be understood as applying to the facts of that case. [Press Brick Co. v. Construction Co., 177 Mo. App. 573, 582, 160 S. W. 1027.] We think that case was correctly decided, and the language used at page 350 should not be construed or understood to mean other than that the lien account should contain a fairly itemized account showing what the materials are and the work done and the prices charged so that it can be seen from the face of the account that the law gives a lien therefor. [State ex rel. v. Reynolds, 266 Mo. 595, 598, 182 S. W. 783.]

Rejecting, as we must, the two general items mentioned as being insufficient, the balance of plaintiff's account, as found by the trial court, applying the credits, as we think we should do, on the rejected items, is $231, to which is to be added interest at six per cent, from August 13, 1915, to date. That part of the account, inclusive of the lumber furnished for the barn, itemized and priced at a lump sum, is sufficient to meet the statutory requirements.

Other errors complained of have been noted but are not sustained.

The case is therefore reversed and remanded with directions to enter judgment in the said sum of $231 with interest as above mentioned. *Cox, P. J.*, and *Farrington, J.*, concur.

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GEORGE T. HUMPHREY, Appellant, v. JAMES W. LUSK et al., Receivers, Respondents.

Springfield Court of Appeals, June 23, 1917.

1. **MASTER AND SERVANT: Duty of Servant to Take Precautions.** A master has a right to exact of the servant the intelligent use of his senses in performing his work and that he will take proper precautions for his own safety.
2. **———: Duty of Master as to Tools: Cannot be Delegated: Master Excused When.** The master owes to the servant the duty to furnish and keep reasonably safe the tools and appliances used by the servant. And while ordinarily such duty cannot be delegated to others, yet the master may require reasonable inspection by the servant and cannot be held liable for a servant's injury which is due to the servant's own failure to inspect the tools used.
3. **———: Defective Tools: Knowledge on Part of Servant: When Recovery Regardless.** Mere knowledge on the part of the servant of defects in tools and dangers in their use will not defeat recovery unless the peril is so obvious and glaring that an ordinarily prudent man would not use the tool and this is especially true where the master has promised to repair the tool.
4. **———: Use of Defective Tool by Servant: Master's Promise to Repair.** Where a servant seeks to excuse himself for using a tool known to be defective because of the master's promise to repair it, he must further show that the master's promise and assurance to repair were the inducing causes for continued use.
5. **MASTER AND SERVANT: Use of Defective Tool by Servant: Authority of Person Making Promise to Repair.** Where a servant seeks to excuse his use of a tool known to be defective on the ground of the master's promise to repair same it must be further shown that the person making the promise has the real authority to represent the master in that respect or is held out by the master as having such authority.
6. **———: Servant's Injury: Master Not Liable: When: Evidence.** Action by servant against master for personal injuries occasioned by defective shears used by plaintiff in cutting iron for the master. There was evidence that the dull condition of the shears was made known to two other employees who promised to sharpen them. Evidence examined, conditions and scope of authority of the other two servants considered. *Held*, that the knowledge of the defective condition of the shears was not brought home to the master so as to permit him to have same sharpened as knowledge of the fellow workmen was not knowledge of the master: *held* further that the promise of future repairs was not made by one having authority to represent the master.

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Appeal from Jasper County Circuit Court.—*Hon. J. D. Perkins,* Judge.

AFFIRMED.

Fielding P. Sizer for appellant.

W. F. Evans, Mann, Todd & Mann. McReynolds & Halliburton and *Gray & Gray* for respondent.

STURGIS, J.—In this action plaintiff seeks to recover for personal injuries received while in defendant's employ as operator of a machine called "shears" used in cutting iron at defendant's repair shops at Springfield, Missouri. These shears were operated by electricity and the two large blades, or knives, opened and closed at regular intervals in the manner of ordinary shears. They were powerful enough to cut bars or sheets of iron of considerable thickness. The piece of iron to be cut was placed by the operator on the lower blade, which was stationary, and the other descended with sufficient force and power to cut it off. In so doing on this occasion a piece of iron held by plaintiff slipped between the knives and, flying back, caught his finger against a guard mashing the same. The negligence is stated in the petition as follows: "Plaintiff placed the front end of said iron upon the lower blade of said shears, while the upper blade was going up, and before same should descend to cut said iron, and when the upper blade came down in its regular movement it came in contact with the iron so placed as aforesaid, and on account of the defective and dull and blunt condition of said shears, the front end of said iron was suddenly thrown out of the grasp or bite of said shears as they closed upon same, thereby throwing plaintiff's right hand against the guard to said shears with such force and violence that plaintiff's middle finger upon his right hand was mashed and crushed. Plaintiff further states that he had requested those in charge of the sharpening and furnishing of shears

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for said machinery to sharpen same or furnish plaintiff with blades that were not defective, blunt and dull; and that said foreman in charge of said work employed by the defendants as aforesaid, promised plaintiff that he would furnish same; and relying upon the promises of the defendants, their agents, servants and employees plaintiff continued to work with said machinery, thinking that he could do so by exercising ordinary care on his part; and while doing so, and before said shears were furnished as aforesaid, plaintiff was injured as above set forth, which injuries were directly caused by the negligence of the defendants, their agents, servants and employees, in failing to exercise ordinary care to furnish plaintiff with blades that were reasonably sharp; that the blades which were on said shears were defective, blunt, dull and insecure, and were so beveled that they could not take or catch upon the metal inserted between the blades as aforesaid. That the defendants further were negligent in failing to furnish plaintiff with sharp blades as aforesaid, and were further negligent in promising plaintiff that they would supply such blades and failing to supply same after having promised to do so; that as the direct result of such negligence, acting separately or conjointly, plaintiff was injured as aforesaid." The answer is a general denial and a plea of contributary negligence. The trial resulted in an instruction at the close of plaintiff's evidence directing a verdict for defendants, to avoid which plaintiff took a nonsuit. The court refused to set this aside on plaintiff's motion and he appeals.

The parties do not differ so much as to the law of this case as to the facts and what inference the jury might properly draw from the evidence in plaintiff's favor. If plaintiff made a case for the jury it is solely by his own evidence. He testified that the shears in question had been sharpened some two weeks previous to this accident but by use had become dull and blunt; that this caused same to be dangerous because of the liability of the pieces of iron to slip and fly out under

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the strong pressure of the knives, and that this actually happened on this occasion, causing his injury.

Plaintiff thereupon invokes the doctrine that it is the duty of the master to furnish his servant reasonably safe tools and appliances with which to work and to keep same in such reasonably safe condition at all times. Plaintiff's evidence showed a violation of this duty resulting in his injury. But does that alone make a case for him? Evidently he thought not, and correctly so, in view of the fact that he was the one who operated this machine and that these knives became dull under and by his use and that he would be and was the one who would first see and observe this condition and know and realize the danger of the longer use of same without sharpening. He testified that there was no way to tell how long a pair of these shears would stay sharp, depending on the extent to which he used them and how well they had been previously sharpened. Plaintiff also knew that as operator of this machine it was his duty, on observing the dull and therefore dangerous condition of these knives, to take some steps to have or cause same to be sharpened, and that a failure to do so and his continued use of same without doing anything to remedy or cause to be remedied this known defect would be negligence on his part. He also knew that the master could not be held for negligence in not repairing this defect unless such master had actual or constructive knowledge of the existence of such defect for a sufficient length of time to remedy same. How was the master to know this unless he took some action?

These additional elements entering into plaintiff's cause of action result from the fact that the master has a right to exact of the servant the intelligent use of his senses in performing his work and that he take proper precautions for his own safety. [Forbes v. Dunnevant, 198 Mo. 193, 209, 95 S. W. 934; Bowen v. Railroad, 95 Mo. 268, 8 S. W. 230.]

While the general rule is that the duty to furnish and keep reasonably safe the tools and appliances used by the servant cannot be delegated by the master

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to others so as to escape liability, this doctrine is limited by the further rule that the master may properly entrust to the servant the reasonable inspection and seeing to the repair of the tools and appliances used by him; and where plaintiff's injury results in whole or in part from his own negligence in this respect, the master is not liable. Under the facts of this case the duty devolved on plaintiff to observe when the shears became dull and dangerous and to take proper steps to have same sharpened or replaced with sharp shears. [Kelley v. Railroad, 105 Mo. App. 365, 79 S. W. 973; Forbes v. Dunnevant, 198 Mo. 193, 210, 95 S. W. 934; Bradley v. Tea & Coffee Co., 213 Mo. 320, 330, 111 S. W. 919; Rowden v. Mining Co., 136 Mo. App. 376, 117 S. W. 965; Knorpp v. Wagner, 195 Mo. 637, 663, 93 S. W. 961.]

We have said that the plaintiff knew that the proof of the performance of these duties resting on him was essential to his case, and so he alleged, as part of his cause of action, that, on seeing that these knives were dull and dangerous, he notified those in authority, and whose duty it would be to have the defect remedied, of the condition thereof; and, to excuse his continued use of the machine in its defective condition, he further alleged that the foreman in charge of the work and representing the master directed him to continue using these shears and that the defect would be remedied; that plaintiff did so, relying on such promise and assurance and believing that he could use same with safety by using due care. Plaintiff undertook to prove these facts, which are clearly essential to his recovery, and did prove some of them, at least. He testified that he observed and knew that these knives were dull and that the danger of using same was so great that he would have quit his job except for this promise and assurance. The plaintiff, however, further testified that the blades were not so dull or the danger of using them so glaring but that he thought he could safely continue to use same with due care. In this respect the plaintiff brought himself within the rule which he invokes,

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and defendants concede, that mere knowledge of defects in, and dangers in the use of, tools and appliances will not defeat recovery unless the peril is so obvious and glaring as to deter an ordinarily prudent man from using same, and this is especially true when the servant has the express or implied promise of repair and assurance of the master that he can do so till the defect is repaired. [Wainright v. Lumber Co., 156 Mo. App. 512, 519, 137 S. W. 53; Morgan v. Mining Co., 160 Mo. App. 99, 120, 141 S. W. 735; Thompson v. Railroad, 86 Mo. App. 141, 148; Delo v. Mining Co., 160 Mo. App. 38, 43, 141 S. W. 687.] Where the plaintiff seeks to excuse himself for using a known defective and dangerous machine because of the master's promise to repair it, he must further show that this promise and assurance was the inducing cause for the continued use. [Coin v. Lounge Co., 222 Mo. 488, 514, 121 S. W. 1; Holloran v. Foundry Co., 133 Mo. 470, 479, 35 S. W. 260; Ryan v. Box Co., 156 Mo. App. 693, 137 S. W. 1008; Pulley v. Standard Oil Co., 136 Mo. App. 172, 175, 116 S. W. 430.]

Where reliance on a promise of future repairs is, as it is here, a controlling factor, the rule assumes and is bottomed on the fact that plaintiff must prove that the person who makes the promise of repair or assurance of safety has authority in that respect and represents the master in so doing, or is one whom the master holds out as having such authority by custom or usage. This was assumed in the Holloran case, supra, at page 480, and is so held in McGowan v. Railroad, 61 Mo. 528, 531; Shackleton v. Railroad (Mich.), 64 N. W. 728; Webber v. Piper (N. Y.), 17 N. E. 216; Cicalese v. Railroad (N. J.), 69 Atl. 166; Hampton v. Traction Co. (Neb.) 154 N. W. 716; American Tobacco Co. v. Adams (Ky.), 125 S. W. 1067, 1070. In 4 Labatt's Master & Servant, section 1342, page 3854, the rule is stated thus: "An analysis of the decisions involving the effect of a promise shows that the servant is deemed to have no cause of action unless he proves the following facts. . . . That the prom-

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ise was given either by the master himself or by some agent authorized to make it in his behalf." [See, also, idem section 1344, page 3859; 28 Cyc. 1208.]

The person whom plaintiff says he notified of these shears being dull and who told him to go ahead and use them and promised him to have same sharpened, is named Larkin. This man, plaintiff says, was a machinist and worked in the "thread house" whatever that may mean. When knives were to be sharpened he was the man who first worked on them and dressed them up and got them ready to be hardened. Then the knives were taken to the blacksmith, Meynard, who hardened them. There is no testimony as to either of these parties being a foreman or having any such authority. All that plaintiff testified to as to the apparent authority of this man was that plaintiff had worked as operator of this machine for some six months and for a month or two previous as helper to the then operator; that from the start whenever he wanted sharp blades he went to this man Larkin; that there were several pairs of blades there but never more than one sharp pair; that when the blades got dull plaintiff would go to Larkin and he would sharpen them and then the blacksmith would harden them. It appears that when one pair got dull they did not stop and wait for it to be sharpened, but another pair was sharpened and put on in place of the dull ones. Plaintiff would change the blades; would take the old ones off and put others on after they were sharpened. After a pair were sharpened and hardened sometimes the blacksmith brought them to plaintiff to change and sometimes the plaintiff went after them. Plaintiff took them to Larkin and Larkin took them to Meynard, the blacksmith, or Meynard went to Larkin for them. When plaintiff got them back, he always got them from Meynard. "When the blades got dull so that I thought they needed sharpening, I took them to either Meynard or Larkin to have them sharpened."

On the occasion of this accident plaintiff says he noticed that the shears were dull and told Larkin of

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that fact; that Larkin said that they ought not to be dull so soon, but when he looked at them he said: "Those blades are duller than if they had been cut with six months, and they haven't been on two weeks. Go ahead and use them and I will fix you up another pair and you can put them on." The next day plaintiff was injured. Plaintiff further testified that one Walter Constant had charge of that shop; that no one ever directed him to do otherwise than to go to Larkin and Meynard to get shears sharpened.

Under these facts we fail, as did the trial judge, to find any evidence that Larkin occupied the position of foreman as alleged or that he represented the master in that capacity. He and Meynard, so far as shown, were mere fellow workment with plaintiff in the same shop. Each of those men performed a certain part of the work of sharpening the shears when so requested by plaintiff, and doubtless such was their duty. Larkin did the first part of the work of sharpening and Meynard did the last part. For this reason only did plaintiff go to Larkin first and Meynard last. The master properly imposed on plaintiff, and this the plaintiff fully recognized, the duty of observing the condition of these shears and when dull to take same to these other workmen to be sharpened. It was then the duty of these other men to sharpen them. Any failure on their part to do this work promptly would be known to plaintiff and would be a proper matter to report, if necessary, to the person in authority. The duty to these other workmen to sharpen the tools used by plaintiff on plaintiff's request, did not make either of them a vice-principal or confer authority on either to assure plaintiff of safety in using defective tools or to excuse plaintiff from so doing by promising to make repairs at a later time. For aught that appears the delay of these fellow workmen in making the requested repairs was a mere matter of convenience on their part. Plaintiff's case must, therefore, fail because: (1) no knowledge of the dull condition of these shears was

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brought home to the master so as to permit him to have same sharpened, for a knowledge of such defect by plaintiff's fellow workmen was not the knowledge of the master; and (2) the promise of future repairs was not made by one having authority to represent the master.

The ruling of the trial court, therefore, was correct and the judgment will be affirmed. *Cox, P. J.*, and *Farrington, J.*, concur.

SARAH McQUITTY, Respondent, v. KANSAS CITY SOUTHERN RAILWAY COMPANY, Appellant.

Springfield Court of Appeal, June 23, 1917.

1. **RAILROADS: Track a Constant Warning: Duty of One Crossing.** A railroad track is itself a warning of danger and though an approaching train fail to give other warnings required by positive law or by the facts of the particular case, yet one who without listening or looking, heedlessly attempts to cross such track in front of such negligently operated train, when to look or listen would make known the peril in time to avoid injury, is himself guilty of negligence as a matter of law, contributing to his own injury, and cannot recover damages.

2. **———: Care in Crossing: Right to Rely on Warning Signals.** One about to cross a railroad track is not required to use extraordinary care to look and listen for approaching trains and the right to rely on a compliance with the requirements that approaching trains give due warning by bell or whistle is an important factor in determining whether such traveler is guilty of negligence as a matter of law.

3. **———: ———: Exception to General Rule Arising from Use of Particular Tracks.** The rule that railroad tracks are signals of danger requiring those about to cross to look and listen for trains approaching, applies only to tracks which are likely to be used at any particular time. Side-tracks and switches may be so restricted in their use as to make it a question for the jury to say whether one about to cross such track had reason to anticipate that a train might be running thereon.

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4. ———: **Due Care: Presumption: Action for Death.** Action for death of one whose duties required him to cross and recross many times a spur of defendant railway for which deceased was working. Deceased was crushed by a freight car which was standing on the spur track when such car was bumped by an engine without warning. There was no evidence that deceased did not listen attentively for an approaching engine and in the absence of such evidence the presumption of due care in this respect attended the deceased.

5. ———: **Death: Due Care: Evidence.** Action for death of employee whose duties required him to cross and recross defendant's spur track many times, such track being used only on rare occasions. Conditions and circumstances examined and deceased considered not negligent in failing to look and listen under circumstances where the presence of defendant's engine could not reasonably have been anticipated.

Appeal from Jasper County Circuit Court.—*Hon. D. E. Blair,* Judge.

AFFIRMED.

Cyrus Crane for appellant.

Robert Sheppard for respondent.

STURGIS, J.—The plaintiff's husband, at the time he received the injuries causing his death, was both engineer and fireman of a stationary engine used in loading gravel on cars for use on defendant's road. Deceased was in the employ of the gravel company. The gravel plant, located near Noel, Missouri, was reached by a switch about 1000 feet long connected with defendant's main line and extending to and along the bank of Elk River where was located the machinery for loading the gravel into the cars. The hoister, near the river bank, was placed on a concrete foundation seven or eight feet high and the engine for operating same was also located there. The boiler, however, was located on the ground so that the deceased, in passing from the engine to the boiler or *vice versa,* came down, or up, a short flight of steps and then passed over an intervening space of some thirty feet to the front end

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of the boiler. This thirty foot space was the length of the concrete foundation forming a wall with the boiler at one end and the steps leading up to the engine and hoister at the other. Across this space from the boiler to the steps and parallel with the concrete wall the deceased passed frequently in the course of his work. A spur track, called the coal track, branched off from the main or gravel switch and extended to and ended at right angles with the concrete wall, striking same at or about the middle of this space between the boiler and steps leading to the engine and hoister. In passing, therefore, from the boiler to the engine or steps leading to same, or *vice versa,* the deceased passed over the end of this spur track where same butted against the concrete foundation wall. Here deceased met his death by being caught and crushed between this wall and a freight car shoved against same on this spur track. The plaintiff recovered judgment for damages and defendant appeals.

The negligence alleged is that the defendant suddenly and without warning shoved a freight car against this wall and caught and crushed the deceased as he was passing along the wall and over the end of the spur track in going from the boiler to the engine. The defense is a denial of the negligence and a plea of contributory negligence in that deceased attempted to pass through the narrow space between the end of the then standing car and the wall without looking or taking heed of the approaching engine.

The first error assigned is that the court should have declared the deceased's conduct in this respect contributory negligence as a matter of law and directed a verdict for the defendant instead of submitting the question of contributory negligence to the jury. The other error relates to the giving of an instruction on contributory negligence. These alleged errors are closely connected and may be considered together.

The evidence favorable to plaintiff shows that this spur track or coal track was not used, except perhaps on rare occasions, to set in gravel cars, but was used

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only for cars of merchandise, principally coal, used by the gravel company and on which the gravel company paid freight. Such cars were billed in and out by the defendant's agent at Noel. The gravel cars were handled on the long gravel track by defendant's work train and, as the gravel was used by defendant for ballast, no freight was paid thereon and the local agent had nothing to do with their shipment. This spur track, some 270 feet long from its intersection with the gravel track to its termination at and against the concrete wall, was used only at comparatively infrequent intervals and the cars taken in and out thereon were handled by the local freight crew and engine instead of the work train which handled the gravel cars. The accident in question was caused, however, by the engine of the work train attempting to take out this car of merchandise which had been loaded and billed out by the gravel company. This car had been set in by the local freight some two or three days previous to the accident and was loaded by the gravel company the day previous and billed out for shipment to Joplin on that day. This car was not, however, taken out by the north-bound local freight as was expected by the deceased and others, including the foreman of the gravel company, and that train had gone on north and no train which, in the usual course of events, would handle this car would be there for a considerable time. The deceased made a remark to this effect while eating his noon lunch a short time after the local freight had passed by and shortly before the accident. It is further shown that, the local freight being behind time, the conductor thereof made an arrangement with the crew of the work train to set out this car at a convenient place on the main line to be picked up by the local freight on its next trip. Neither the gravel company nor the deceased had any knowledge of this arrangement. It is not shown whether the deceased knew that the work train was moving gravel cars on the gravel switch or not, as it was so doing only fifteen to twenty minutes before this accident, and some of the other workman observed

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it before it came in on this coal track and some did not. In any event the evidence is ample to show that about the time the work train engine started in on this spur track the deceased was at work about the boiler; that the merchandise car in question was standing on the spur track with the end about four feet from the wall; that the work train engine came slightly down grade, without any warning of bell or whistle and with but little or no noise; that it attempted to couple to this standing car and, failing to make a coupling, shoved it against the wall catching deceased as he was attempting to pass through the narrow opening.

It was also shown that there was a coal bin eight or nine feet high built along the spur track only four feet from the rail and some thirty feet long. This coal bin began seventeen feet from the foundation wall and front end of the boiler in line therewith. As the deceased came from the boiler toward the opening between the car and the wall this coal bin obstructed his view toward the coming engine until he reached a point where he could look through the narrow space between the coal bin and the loaded car. This space was less than two feet wide, making allowance for the projection of the car beyond the rail. Though this narrow space was the only place at which deceased, by looking, could have seen the coming engine. There was a curve in the spur track but it is possible and perhaps probable that, had deceased looked through this narrow space, the engine was close enough to the standing car to have been seen before the deceased came into the fatal danger.

The defendant invokes the well known rule of law that a railroad track is itself a warning of danger and, though an approaching train fails to give other warnings required by positive law or the facts of the particular case, yet one who, without listening or looking, heedlessly attempts to cross such track in front of such negligently operated train, when to look or listen would make known the peril in time to avoid injury, is himself guilty of negligence, as a matter of law, contributing to

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his own injury and cannot recover damages. In case of a foot traveler, who has perfect control over his senses and movements, this rule has been applied even though the space where the view is unobstructed is narrow. [Giardina v. Railroad, 185 Mo. 330, 84 S. W. 928; Farris v. Railroad, 167 Mo. App. 392, 398, 151 S. W. 979; Underwood v. Railroad, 182 Mo. App. 252, 262, 168 S. W. 803.] There is no evidence that deceased did not listen attentively for an approaching engine as he approached the opening between the wall and the standing car. The presumption of due care in this respect attends him and we must presume that the reason he did not hear the coming engine was because no warning noise was being given. [Stotler v. Railroad, 200 Mo. 107, 146, 98 S. W. 509; Webb v. Baldwin, 165 Mo. App. 240, 252, 147 S. W. 849; Hubbard v. Lusk et al., 181 S. W. 1028, 1030.]

We do not find it necessary to place limits on the rule invoked or decide to what extent the law requires that a foot traveler, who uses due diligence as to listening and whose vision is obstructed, must, at his peril, look through a narrow opening for a stealthily coming train. We merely remark that there may be a limit to this doctrine, making it a jury question, and to hold otherwise comes dangerously near requiring more than ordinary care, for, as said in Kenney v. Railroad, 105 Mo. 270, 15 S. W. 983; 16 S. W. 837: "He was under no legal obligation to shape his actions on the theory that defendant would disregard the plain requirements of law respecting a signal of its coming train." See, also, what this court said in Underwood v. Railroad, 190 Mo. App. 407, 416, 177 S. W. 724. It was also said in some case, the citation of which is not now at hand, that a traveler, in approaching a railroad track where he has a right to cross, is not expected to do so with the same caution and vigilance as to coming trains that he would for a thief in the night stealthily approaching, intent on taking his life without being discovered.

The reason we need not pass on the point just mentioned is, that the use to which a railroad track is subject is a factor and the court gave the following instruc-

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tion, modifying one asked by defendant, by inserting the words in italics and this modificaton constitutes defendant's second assignment of error, to-wit: "The court instructs the jury that it was the duty of the deceased McQuitty before going upon or crossing over the track in question between the end of the standing car and the concrete wall to look and listen for an approaching train or engine, *if under all the facts and circumstances in evidence the presence of a locomotive at work upon said track at that time could reasonably have been anticipated by deceased,* and if you find that by looking where there was an opportunity, if any, to see the engine he could have seen it, or by listening could have heard it, in time to have averted the injury to him and failed to do so, then the said McQuitty was guilty of contributory negligence and plaintiff cannot recover and your verict must be for defendant and this is so even though you may find from the evidence that the engine did not give a reasonable warning of its approach, and even though you may further believe that no one of defendant's employees was sent ahead of the engine to warn persons of its approach."

This instruction is assailed as being destructive of the rule that a railroad track is itself a signal of danger and requires a person about to cross same to look and listen for an approaching train. The instruction, however, does no more than assert an exception to that rule based on the particular facts of the case and the use to which the track is subjected. The authorities announcing this rule are cases dealing with railroad tracks used in the ordinary way for running trains thereon. Certainly it is only *used* tracks, on which the traveler has reason to believe that a train might approach at that particular time, that constitutes a signal of danger. Generally speaking, and so far as the ordinary traveler knows, trains may run on a used track at any time and he has no right to assume the contrary, but there may be exceptions. Here was a spur track used only for putting in and taking out occasional merchandise cars. This was done by the engine and crew of the local

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freight. On this occasion the car in question had been billed out by the station agent and the deceased and others were informed that the local freight, arriving shortly before noon, would take it out. Deceased knew that that train had not done so but had gone on north on its regular trip and that no other train handling such a car would arrive for some time. The evidence also justified the finding that the work train, even if deceased knew that it was working on the gravel track, had never been known to handle merchandise cars on this spur track. That train was engaged in an entirely different class of business. Only because of the exceptional arrangement between the two conductors, unknown to deceased or anyone working at the gravel plant, did the work train engine attempt to move this merchandise car. The deceased might be held negligent for not anticipating at that particular time the presence on this track of an engine which, in the method of conducting the business, might probably be there at any time; but, knowing the impossibility of such an engine being there at that time, why should he be held bound to anticipate the presence of another engine which, according to the method of business, never entered on that track.

Side tracks and switches may be set aside for use in a particular way and for a particular purpose and, under the rules and customs adopted, persons may work in or about the same and cross and recross the tracks on which they stand in reliance on such track not being used and the cars thereon not moved, except in accordance with fixed regulations. Repair tracks, loading tracks, tracks or cars protected by the blue flag rule, are examples. In this case the deceased was engaged and probably absorbed in his regular work involving the crossing and recrossing of this spur track. That defendant owed him the duty not to move this car across his path of work without a positive and sufficient warning must be conceded. Since the deceased was rightfully crossing the track at this place and defendant knew he might be so doing, even the local freight owed him this duty. Having ascertained that that train had gone and

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no possibility of its moving the car in question, it would be a harsh rule which would forbid the deceased to, in any degree, relax the vigilance required of him with respect to an expected train. Why should he be required to guard against the work train engine doing something which there was no reason to anticipate?

We are not without authorities for so ruling. In Langan v. Railway, 72 Mo. 392, 398, the court held that "Negligence is not imputable to a person for failing to look out for a danger, when, under the surrounding circumstances, the person sought to be charged with it had no reason to suspect that danger was to be apprehended." In Spotts v. Railroad, 111 Mo. 380, 386, 20 S. W. 190, in considering plaintiff's contributory negligence under somewhat similar facts, the court said: "There was nothing to suggest the probability of any such movement of cars in that direction as actually took place. He was not a trespasser. The limited space available as standing room indicates that his taking position where he did, while awaiting the weighing of the empty car on track 8, was a most natural act. But, without repeating facts already mentioned, it is enough to say that we do not consider his action in the premises as justifying a ruling that he was negligent as a matter of law. The jury have found that he was not, as a matter of fact." In Nelson v. Railroad, 132 Mo. App. 687, 695, 112 S. W. 1017, in speaking of a Pullman employee who was injured by being struck by a moving car on a switch track used for storing cars not in use, the court said: "There is no dispute but what it is the duty of a person before he goes upon a railroad track to use due care to avoid danger of injury from passing engines and cars. *In the case under consideration the coach track was not so used by the company.* Its cars and engines did not pass over it in coming and going, nor was it used generally for switching purposes. It was used principally as a place of deposit for cabooses, ice and Pullman cars when not in actual service." This court recognized this principle in Hubbard v. Lusk, et al., 181 S. W. 1028, where deceased was killed in attempting to pass between cars on

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a loading switch and there said: "It is true, as so often said, that a railroad track is itself a warning of danger, and one cannot heedlessly step thereon without looking or listening in reliance on those operating trains to give warning of their approach, and this, to a degree at least, applies to switches used infrequently and where trains are run at a slow rate of speed." [See, also, Kame v. Railroad, 254 Mo. 175, 162 S. W. 640; Lanning v. Railroad, 196 Mo. 647, 94 S. W. 491; Gessey v. Railroad, 32 Mo. App. 413.] In the Nelson case, supra, the court further held that one who was working about cars standing on switches and which were not supposed to be moved without giving warning to such workmen, had a right to become absorbed in his work and rely on the presumption that such cars would not be moved without due warning and "He is not compelled to be on the lookout for unusual danger." Gessey v. Railroad, 32 Mo. App. 413, announces this same rule.

After much consideration we are convinced that this case was well and properly tried and the judgment is affirmed. *Cox, P. J.*, and *Farrington, J.*, concur.

C. A. BURTON MACHINERY CO., A Corporation, Appellant, v. EFFIE M. RUTH, Executrix of the Estate of H. I. RUTH, Deceased, JOHN W. BERRY, E. E. GRAHAM, L. W. CHAPMAN and CHARLES E. LANGLEY, Respondents.

Springfield Court of Appeals, June 23, 1917.

1. **BONDS: Statutory Forms: Common Law: Who May Recover on.** A bond which does not follow the form laid down by the statute or embody the prescribed conditions may, nevertheless. be good as a common law bond and may be sued on by any one for whose benefit it was made, whether named therein or not.

2. **BONDS AND CONTRACTS: Who May Maintain Action on.** A third party may sue on a contract or bond entered into for his benefit

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though not named therein and not privy to the consideration where the obligees in the bond owe such party a duty of protection and the terms of the bond are sufficiently broad and specific to cover such duty.

3. **BONDS: Valid if Not Violative of Statute or Against Public Policy.** A bond though voluntary and not authorized by any statute is valid if it does not contravene public policy nor violate any statute.

4. **———: Failure to Meet Statutory Requirements: May be Good Under Common Law.** A bond taken by a public officer in attempted compliance with a statute may be good as a common law bond though it falls short of fulfilling the requirements of the statute.

5. **BONDS AND CONTRACTS: Action on: Who May Maintain.** To enable third persons not named in a bond or contract to sue thereon it must appear by the terms of the contract or bond that they are of the class covered by the conditions of the bond.

6. **PUBLIC OFFICERS: Neglect of Duty: Individual Liability.** Where public officers are required by law to take a bond from contractors of public buildings for the protection of laborers and materialmen, a failure to take a bond good as a statutory or common law bond renders such officers individually liable in damages, the taking of such bond being a ministerial act.

7. **BONDS AND CONTRACTS: School Buildings: Duty of Trustees to Require Bond of Contractor: Failure: Liability.** Action by materialman against school directors for failure to require from the contractor doing certain work a proper and sufficient bond conditioned for payment of material used as required by sec. 1247, R. S. 1909—amended Laws 1911, p. 106. The bond which the contractor executed is examined and deemed not, to comply with the statutory requirements. *Held*, also, that the bond was not available as a common law obligation on which the materialman might sue and as the taking of the bond was a ministerial act the school trustees were liable for failure to demand bond in accordance with the statute.

8. **———: School Buildings: Failure of School Directors to Require Bond of Contractor: Liable, When.** The trustees of a school district did not require a contractor in the construction of a school building a bond complying with statutory requirements and the bond which they did require was not good as a common law obligation. The act required of the trustees by the statute was ministerial and the trustees cannot escape individual liability on the ground that the drafting, preparation and wording of the bond was judicial.

Appeal from Butler County Circuit Court.—*Hon. J. P. Foard*, Judge.

REVERSED AND REMANDED (*with directions*).

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Lew R. Thomason, for appellant.

David W. Hill. Mozley & Green, Hugh E. Tyson and *Sheppard & Sheppard* for respondents.

STURGIS, J.—This suit is brought by plaintiff, a materialman who furnished a heating apparatus for a public school building in Poplar Bluff, Missouri, against defendants as members of the Board of Directors of the Poplar Bluff School District, based on the failure of defendants as such Board of Directors to require the contractor to execute a bond to such district conditioned for the payment of all material used in such work as required by section 1247, Revised Statutes 1909, amended, Laws 1911, page 106, as to a matter not material here. The petition counts on these facts: That defendants composed the Board of Directors of such school district; that said board contracted on behalf of the district with the firm of Lewis & Kitchen, contractors, to have them furnish and install a heating system in the high school building of that district; that plaintiff sold and delivered to said firm two boilers and fixtures to be used, and which were used, in constructing and installing such heating system and thereafter accepted and now in use in said building; that the firm of Lewis & Kitchen, became bankrupt and insolvent and plaintiff has never received payment; that the defendants failed, neglected and refused to require the contractors, Lewis & Kitchen, to give a bond conditioned as required by law; that plaintiff thereby lost the protection which such bond would have afforded it and is damaged thereby in the sum of $992.15, the price and value of such materials.

The case was here on a former appeal, reported in 186 S. W. 737, wherein the sufficiency of the petition as stating a cause of action was involved. This court then held that the petition stated a cause of action and, in so ruling, held that the duty of requiring a bond under

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this statute is ministerial and that a failure so to do renders the members of the board individually liable in damages to a materialman who has furnished the insolvent contractor material entering into the public building and for which he is unable to collect.

That case was decided on the theory that no bond was required or given by such contractor. It now appears on the facts coming in that the contractor was required to and did in fact give a bond, amply sufficient in amount, to the school district and the comp'aint is that such bond does not contain the required statutory conditions "for the payment of all material used in such work and for all labor performed in such work, whether by sub-contractor or otherwise" or any equivalent condition such as will sustain an action by plaintiff on such a bond. It was held in Press Brick Co. v School District, 79 Mo. App. 665, 669, that the evident purpose of this act, since amended, is, since public buildings are exempt from the operati n of the mechanic's lien law, to afford a bond of the contractor giving a right of action thereon to such persons as would have a right to file and enforce a lien on such building were it not so exempt. It was held in that case, as the statute then read, that the duty to require the bond was corporate and not individual and no individual liability was incurred by the failure to require the bond. The statute was thereafter amended in 1909 so as to read as it now does for the evident purpose of making the duty, and therefore the liability, individual. The amendment cured the very defect which the court then held exempted individual liability and the statute now *does* "point out the county judge, the city aldermen, the town trustee and the directors of the school districts as the person or collection of persons who shall require the contractor to give the bond for the protection of the subcontractor, etc. . . . " [La Crosse Lumber Co. v. Schwartz, 163 Mo. App. 659, 663, 147 S. W. 501.]

The main contention in this case is whether the bond required and given by this contractor does afford a right of action thereon to this plaintiff. The bond, after re-

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citing the making of the contract with Lewis & Kitchen, is conditioned: "Now, if the said Lewis & Kitchen, shall well and truly perform and fulfill all and every the covenants, conditions, stipulations and agreements in said contract mentioned to be performed and fulfilled . . . and shall keep the said School District of Poplar Bluff, Missouri, harmless and indemnified from and against all and every claim, demand, judgment, liens and mechanic's liens, costs and fees of every description incurred in suits or otherwise, that may be had against them or against the buildings to be erected under said contract, including such alterations and additions' and shall *repay* the said School District of Poplar Bluff, Missouri, all sums of money which they may pay to other persons on account of work and labor done or materials furnished on or for said buildings, and if the said Lewis & Kitchen shall pay to the said School District of Poplar Bluff, Missouri, all damages they may sustain, and all forfeitures to which they may be entitled by reason of the non-performance or mal-performance on the part of said Lewis & Kitchen of any of the covenants, conditions, stipulations and agreements of said contract, then this obligation shall be void, otherwise the same shall remain in full force and virtue."

Since the bond is conditioned that the contractor perform and fulfill all the covenants and agreements of his contract, such covenants and agreements become conditions of the bond. The provisions of the contract so far as they have any bearing on "the payment for all material used in such work" are:

"The contractors shall and will provide all the materials and perform all the work for the installation of a heating and ventilating system in the new High School Building to be erected in the City of Poplar Bluff, Missouri.

"Should the contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agree-

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ments herein contained, such refusal, neglect or failure being certified by the architects, the owners shall be at liberty, after three days' written notice to the contractors, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractors under this contract . . . If the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owners in finishing the work, such excess shall be paid by the owners to the contractors; but if such expense shall exceed such unpaid balance, the contractors shall pay the difference to the owners. The expense incurred by the owners as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereof shall be conclusive upon the parties.

"The owners agree to provide all labor and materials essential to the conduct of this work not included in this contract in such manner as not to delay its progress . . .

"It is hereby mutually agreed between the parties hereto that the sum to be paid by owners to the contractors for said work and materials shall be seven thousand two hundred and ninety dollars ($7290). . . Payments are to be made monthly on estimates made by the architects upon all material on the ground and work done. Fifteen per cent of each estimate shall be reserved and held as final payment. All payments to be made as per schedule filed by these contractors.

"If at any time there shall be evidence of any lien or claim for which, if established, the owners of the said premises might become liable, and which is chargeable to the contractors, the owners shall have the right to retain out of any payment then due or thereafter to become due an amount sufficient to completely indemnify them against such lien or claim. Should there prove to be any such claim after all payments are made, the contractors shall refund to the owners all moneys that the latter may be compelled to pay in discharging any lien

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on said premises made obligatory in consequence of the contractors' default."

It is evident, from a reading of the contract and bond, that same were drafted by using forms adapted to contracts for constructing privately owned buildings. The defendants practically concede that the bond is not a statutory bond and does not contain, unless by indirection, a condition for "the payment of all material used in such work." They contend, however, that the bond is good as a common law bond, can be sued on as such and that there is sufficient in the bond and contract taken together to eke out the requirement to pay materialmen for material used in the work. Realizing the hardship imposed on these school officers, serving without pay, we have carefully scanned the provisions of the contract and bond to see if it is possible to hold that the bond given is in fact such as to accomplish the purpose of affording this plaintiff, a materialman, a cause of action thereon for the material furnished.

We have no difficulty whatever in holding that a bond not complying with the statutory form and embodying the prescribed conditions may, nevertheless, be good as a common law bond and may be sued on by any one for whose benefit it was made whether designated or named therein or not. A third party may sue on a contract or bond entered into for his benefit though not named therein and not privy to the consideration. "It is sufficient in order to create the necessary privity that the promisee owe to the party to be benefited some obligation or duty, legal or equitable, which would give him a just claim. [City, to use, v. Von Phul, 133 Mo. 561, 34 S. W. 843; Devers v. Howard, 144 Mo. 671, 46 S. W. 625; State, to use, v. Cochrane, 264 Mo. 518, 175 S. W. 599.]

"A bond though voluntary and not authorized by any statute is valid if it does not contravene public policy nor violate any statute. [Barnes v. Webster, 16 Mo. 258.] And it is a well settled r le that a bond taken by a public officer in attempted compliance with a statute

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is good as a common law bond though it falls short of fulfilling the requirements of the statute." [Lumber Co. v. Schwartz, 163 Mo. App. 659, 664, 147 S. W. 501; Lumber Co. v. Banks, 136 Mo. App. 44, 117 S. W. 611; Fellows v. Kreutz, 189 Mo. App. 547, 176 S. W. 1080; Uhrich v. Globe Surety Co. of Kansas City, 191 Mo. App. 111, 166 S. W. 845.]

Lumber Co. v. Banks, supra, also holds that the third person for whose benefit the contract was made may sue thereon in his own name.

The plaintiff relies on the case of Lumber Co. v. Banks, 136 Mo. App. 44, 117 S. W. 611, as holding that a materialman cannot maintain a suit on a bond conditioned as this one is. That case, like this one, is a suit on the bond of the contractor by a materialman furnishing material for a public school building. The plaintiff sued on the theory that the bond as good as a common law bond. An examination of the londitions f the bond then in suit shows that it is substantially like this one in that it is conditioned that the contractor shall well and truly perform and fulfill all the conditions and agreements of his contract; keep the school district harmless against claims, demands, liens, etc., against the district or building; and repay all sums which the district might pay to persons furnishing material or work. The contract there, as here, required the contractor at his own cost to furnish all the labor and material and erect the building; provided for payments at intervals as the work progressed, reserving a per cent until final payment, provided that the materials and work were then paid for; that the district might retain from money coming to the contractor enough to pay claims for work and material, etc. We find no material or distingushing difference between the facts of that case and this one. The court in that case lays special stress on the point that plaintiff was not a person who could sue on the bond since "to enable third parties, not named in the bond or in the contract, to sue on the bond, it must clearly appear, by the terms of the contract or bond, that they are of the class covered by the conditions of the

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bond. When they are, they can sue, whether named in the bond or not; when they are not, they have no right of action on the bond," citing Buffalo Forge Co. v. Cullen & Stock Mfg. Co., 105 Mo. App. 484, 79 S. W. 1024. The court further said: "While it may be said that there was no necessity for the school board to protect the building against liens (Press Brick Co. v. School District, 79 Mo. App. 655) the fact remains that this bond was drawn in such terms as to protect the school district alone, and not third parties. Conceding that there is no right of lien against the schoolhouse, counsel for appellant argues that if this bond is not for the protection of third parties, laborers and materialmen, it is meaningless. That may be true, but that fact surely cannot be held to extend the bond beyond its language and terms, or its necessarily implied obligation, at least that cannot be done as against the surety." The difference between the Buffalo Forge case, supra, and the Banks case, supra, is that in the one, the contract and bond to secure its performance, when read together, required the contractor to pay for the labor and material, while in the other, no such requirement was found therein. In the one, it was held that a suit could be maintained by the materialman on the bond and in the other, not.

Defendants maintain that the case of Lumber Co. v. Schwartz, 163 Mo. App. 659, 147 S. W. 501, conflicts with Lumber Co. v. Banks, supra, but this is a misapprehension. The Schwartz case is likewise a suit by a materialman on a bond given by the contractor of a public building on the theory that said bond, though not in compliance with the statute, was good as a common law bond and could be sued on by any one for whose benefit it was taken. The bond then in suit contained a provision, in addition to requiring the contractor to erect the building and furnish all the material and work, that he "deliver the work to the owner free from all debt and liens of every character on account of materials furnished or labor performed in and about said building." The court said (p. 665): "The most serious question

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in the case is the contention of defendants that the bond on its face shows that it was not made for the benefit of third persons but for the sole benefit of the parties themselves. 'If it appear from the contract itself that it was made for the benefit of the contracting parties therein, and no other, an action by a third party cannot of course, be maintained thereon.' [Mfg. Co. v. Clark, 208 Mo. 89.]" The court, however, held and rightly so, that the above condition of the bond is equivalent to a provision requiring the contractor to pay for the material, for how else could he deliver the work free from all debt or liens? On this point the court ruled: "This being a public building no debts made by the contractor could become a lien or charge on the building or impose any liability on the board. So far as the protection of the building and of the board was concerned these words were superfluous but they were pregnant with meaning if their purpose was to benefit third persons. Manifestly it was the intention of the parties to insert a condition similar to that required by the statute, to compel the contractor to pay for material and labor that entered into the construction."[Lumber Co. v. Schwartz, 163 Mo. l. c. 666.]

The Schwartz case is perhaps more accurate and logical than the Banks case in making the condition of the bond the crucial test of plaintiff's right to sue thereon rather than the plaintiff's privity of contract. Thus in Fellows v. Kreutz, 189 Mo. App. 547, 550, the court held: "Galm, the contractor, while not covenanting in this contract and bond with the city that he would pay this plaintiff for material he afterwards bought of him, yet, of course, it was his duty to plaintiff to pay him and hence plaintiff, though not named in the obligation, may bring his action on the bond as being for his benefit. *But, of course, his rights will be governed by the terms of the contract, the benefit of which he seeks to obtain.*"

The difficulty in the present case, as was true in the Banks case, is that neither in the bond nor in the contract, to comply with which is a condition of the bond,

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can be found any agreement, direct or indirect, that the contractor or sureties will pay for the material used in the public building. This point is illustrated by Fellows v. Kreutz, 189 Mo. App. 547, another suit by a materialman on the bond of a contractor of public works where the bond was held good as a common law bond. It was there held that the contractor's agreement *to furnish all the material for a public building is not equivalent to an agreement to pay for same,* since he complies with his contract whether he manufactures the material himself or obtains it on his personal credit. The cases there cited abundantly sustain this position. The court therefore held that there was nothing in the *contract,* similar to the one here, binding the contractor to pay for materials used and that the bond received no help from that source. It was found, however, that the bond itself contained a provision guaranteeing that "he (the contractor) will pay all bills for labor and material" and this is sufficient to sustain an action on such bond by the unpaid materialman. The case of Kansas City, to use, v. Youmans, 213 Mo. 151, 112 S. W. 225, is cited as holding that where the *contract* contained such a provision and the *bond* guarantees its performance, that will be sufficient, and so we would hold.

In Uhrich v. Globe Surety Co., 191 Mo. App. 111, 115, 166 S. W. 845, it was held that one who is only incidentally and indirectly benefited by a contract cannot sue thereon; but the intent to benefit such third party must be expressed in the instrument itself when read and considered in the light of the circumstances surrounding its execution.

We find nothing either in the contract with the school district or in the bond now sued on obligating the contractor or sureties to pay for the material used in this building. Such bligation is found only in the contract of purchase made between the contractor and the plaintiff, but *that* contract is in no way embodied in or guaranteed by the bond sued on.

Defendants seek to point a difference in the "hold back" provisions of the contract and bond in the Banks

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case, supra, and those in the present case, in that in the Banks case the "district might retain from the moneys coming to Banks enough to pay and satisfy such claims for work and material," while in the present contract and bond the district has a right to retain an amount sufficient to indemnify it against such lien or claim. We fail to see any material difference in these provisions and besides the "hold back" clause in any case confers a mere privilege to be exercised for the protection of the owner and does not create an obligation.

Stress is laid on the point that, while the taking of the bond is ministerial, the drafting and the wording of the bond is judicial and this controversy is pointed out as proof that it takes a high degree of acumen to determine whether the bond actually given is so worded as to afford protection to those furnishing material or work used in the building. The argument is that such legal acumen as this should not be required of school boards. The answer to this is, that the statute prescribes the exact conditions to be inserted in the bond and, as we pointed out on the first appeal, an act is ministerial when "performed in a given state of facts in a prescribed manner in obedience to the mandate of legal authority." It is only because the defendants did not require a bond with the prescribed conditions that judicial acumen has been invoked to determine their contention that the bond has equivalent conditions and is therefore equally effectual. There was nothing judicial about it till defendants chose to depart from the plain requirement of the statute and did something different. Having done a ministerial act in a judicial way and failed, defendants cannot complain.

Much might be said against the wisdom of the Legislature in requiring the individual members of the school boards to protect at their peril materialmen and laborers upon public buildings by requiring a good bond from the contractor. When a bond is required, as it was before the amendment of the statute, there is much justice in requiring that those furnishing the material and doing the work themselves look into the sufficiency of

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such bond. With this, however, we have nothing to do. The defendants failed to require a bond in accordance with the statute and are liable.

It results that the judgment is reversed and the cause remanded to be retried in accordance with this opinion.

Farrington, J., concurs; *Cox, P. J.*, not sitting.

J. M. SWIGART, Appellant, v. JAMES W. LUSK, W. C. NIXON and W. B. BIDDLE, Receivers of the ST. LOUIS AND SAN FRANCISCO RAILROAD COMPANY, Respondents.

Springfield Court of Appeals, June 23, 1917.

1. **RAILROADS: Crossings: Signals: Statutory and Otherwise: Effect.** Where a railroad maintains a danger signal at a crossing, whether required by statute or not, the fact that the signal is absent is an invitation to cross and an assurance that the track can be crossed safely. But a traveler is not excused thereby from himself exercising care to avoid a collision. And absence of a danger signal does not excuse a traveler from failure to exercise care whether or not there has usually been a danger signal at a crossing.

2. ———: ———: ———. Where a railroad is guilty of negligence in failure to give statutory warning on approaching a crossing which results in injury to a traveler, the question of a failure to ring a gong customarily rung at such crossing being a ground of its negligence is not material and bears on the question of the traveler's contributory negligence only.

3. **NEGLIGENCE: Negligence Per Se: Established Custom or Ordinance or Statute Violated.** The breach of an established custom as well as an ordinance or statutory regulation or requirement as to signals at crossings is negligence *per se on* the part of the one committing the breach and the knowledge of such custom or ordinance or reliance on same became important only when such custom or ordinance is invoked to excuse the conduct otherwise negligent of a traveler seeking to recover for such negligence.

4. ———: **Viewpoint of Determining.** Negligence, contributory or otherwise, is determined from the viewpoint of the actor.

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5. **PLEADING: Negligence: What Sufficient.** In pleading it is generally sufficient to plead the duty imposed by law or custom and its breach with resultant injury.

6. ———: ———: **Contributory Negligence: Contributory Negligence is a Defense.** While a plaintiff may anticipate the defense of contributory negligence and placed the facts which rebut or excuse same, where negligence, contributory or otherwise is charged it is generally sufficient for the other party to deny same. One may prove without pleading the particular facts which rebut or excuse negligence.

7. **RAILROADS: Crossing Injuries: Failure to Give Statutory Signals.** Action by one who was driving an automobile and who was injured by collision with a train of defendant at a street railroad crossing. The pleading and proof of plaintiff showed that defendant failed to give the signals required by statute of train's approach and that the injury occurred as a result thereof. This entitled plaintiff to recover unless the evidence showed contributory negligence on his part so clearly that reasonable minds could draw no other reasonable conclusion.

8. **APPELLATE PRACTICE: Reviewing Demurrer to Evidence: Facts Considered as True.** Where a demurrer to plaintiff's evidence was sustained by the trial court, the appellate court in reviewing such action will consider as true the facts testified to by the plaintiff, unless such facts are impossible or contrary to physical facts.

9. **RAILROADS: Crossing Collision: Review of Evidence.** Action by an automobile driver against a railroad for injuries occasioned by collision with a train at defendant's crossing. Conditions considered and evidence reviewed. Evidence deemed sufficient to warrant jury in finding that plaintiff exercised ordinary care in looking and listening for the train and that he used ordinary care to avert the threatened danger after its discovery.

10. **NEGLIGENCE: Avoiding Danger: Impractical Thing Not Required.** One acting under the excitement of impending danger is not required, by the law, to do at his peril the thing which afterwards appears to have been the safest. Especially is this so where defendant has, by its neglect of duty and failure to give timely warning, lulled plaintiff into a feeling of security and brought him into peril.

11. **RAILROADS: Crossing Tracks: Rule Concerning.** It is always a person's duty to look and listen when possible before entering on a railroad crossing. Stopping is necessary when it is essential to make looking and listening effectual.

12. ———: ———: **What Acts Not Negligent as Matter of Law.** Action against railroad on account of injuries occasioned by a collision between plaintiff's automobile and defendant's train at city street crossing. The evidence showed that plaintiff approached the cross-

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ing attentively listening for the signals of approaching trains required by statute and for the ringing of the gong maintained by defendant at such crossing but did not hear any signals. His act in approaching the crossing at six or eight miles per hour cannot be declared negligence as a matter law.

13. ———: **Crossing: Looking, Listening: Slowing Down and Stopping.** A traveler approaching a railroad crossing is required to look or listen or both, when practicable, for an approaching train. He is also required to slow down or stop when necessary to make looking or listening effectual.

Appeal from Jasper County Circuit Court, Division Number Two.—*Hon. David E. Blair,* Judge.

REVERSED AND REMANDED.

Grant Emerson and *Walden* N *Andrews* for appellant.

W. F. Evans, Spencer & Grayston and *Mann, Todd & Mann* for respondents.

STURGIS, J.—The plaintiff sues for personal injuries received in a collision with defendant's passenger train while attempting to cross defendant's railroad in an automobile at a grade crossing in the city of Joplin. Plaintiff, when injured, was traveling east on Eight Street, which crosses defendant's tracks running northwest and southeast. The court sustained a demurrer to plaintiff's evidence on the ground of his being guilty of contributory negligence as a matter of law and the correctness of this ruling is the sole question before us.

The train was approaching from the southeast and crossed Eight Street at an angle, though the photographs in evidence indicate that the crossing is nearly at right angles. The negligence alleged is the failure of defendant to give the statutory signals on approaching this crossing, coupled with an allegation that defendant had, for a long time, maintained an automatic electric signal bell at the crossing in question to warn travelers of an approaching train, which was allowed to become defective and failed to ring on this occasion. It is also

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alleged that the view of one approaching this crossing from the west is so obstructed by houses and other improvements that travelers coming from the west on Eight Street cannot see a train approching from the southeast till very close to the crossing. For the purpose of this suit it must be conceded that the maintenance of this automatic bell at the crossing was purely voluntary on defendant's part, since there is no allegation of any such duty imposed by law, State or municipal. It is shown, however, that this bell had been maintained at this crossing for more than a year; that plaintiff had frequently passed over the crossing and knew such fact; that while other witnesses said this bell had failed to ring at other times when trains were approaching, plaintiff testified that he had never known it to fail.

The law in regard to warning signals at much used street crossings is stated in 3 Elliott on Railroads, sec. 1157, thus: "Where maintained, whether required by statute or not, the fact that the gate is open is held to be an invitation to cross and an assurance that the track can be crossed in safety, but such an invitation will not excuse the traveler from himself exercising care to avoid a collision. It is the duty of the company to close the gates on the approach of a train, but the traveler must not rely entirely upon its servant to do so . . . . Although not originally under obligation to do so, if the company has maintained a flagman at a particular crossing for a long time and his presence is notorious, travelers have, within limits, a right to assume, when he is absent, that no train is approaching and his absence or permanent removal, without notice to the public, is evidence of negligence, but where, not knowing that a flagman had usually been stationed at the crossing, the traveler's conduct was in no way influenced by his absence, such absence creates no liability, nor does the absence of a flagman in any event absolve the traveler from the exercise of care." The law as here stated is abundantly recognized in this state. Montgomery v. Railroad, 181 Mo. 477, 500, 503, 79 S. W.

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930, quotes the rule just stated by Elliott and adds: "If on the other hand the flagman was not there, as plaintiff's evidence strongly tends to prove, and the custom of keeping him there was known to plaintiff, the plaintiff might well have concluded that no trains were expected at that time, and such absence was a potent fact in considering her conduct in proceeding over the crossing . . . . The action of the defendant in maintaining a flagman at this public and much-used crossing was most commendable and after the public had become accustomed to seeing the flagman there and advised of his duties, it cannot complain that travelers lawfully using the crossing regulated their conduct upon the implied assurance that the flagman would be there when trains were passing or approaching and finding no one when they came to the crossing would presume no train was near. To assume otherwise would be against all ordinary human experience." To the same effect is Yonkers v. Railroad, 182 Mo. App. 571, 168 S. W. 307.

It may be granted, but we do not so decide, that, in order to count on the failure of defendant to give warning signals at a crossing which are not required by law as an affirmative ground of defendant's negligence, it must be alleged, as well as proved, that same have been given for such length of time and with such uniformity that the giving of same amounts to a custom and that such custom is known to and relied on by the person alleging the breach. It is claimed by defendant that plaintiff's petition is faulty in not alleging that plaintiff know of the long maintenance of this electric alarm and relied on same giving him warning on this occasion of an approaching train. These cases are cited: Percell v. Railway, 126 Mo. App. 43, 53, 103 S. W. 115; Voelker Products Co. v. United Railways, 185 Mo. App. 310, 316, 170 S. W. 332; Paul v. United Railways, 152 Mo. App. 577, 587, 134 S. W. 3; Schumacher v. Breweries Co., 247 Mo. 141, 160, 152 S. W. 13. It will be found that none of these cases except the first one named supports this rule of pleading. But the question as to the failure of the electric gong to give the customary warn-

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ing on this particular occasion being such negligence on defendant's part as would warrant plaintiff's recovery on that ground is of no importance in determining whether the demurrer to the evidence should be sustained. It is both alleged and proven that the defendant failed to give the statutory warning of ringing the bell or sounding the whistle at intervals as the train approached the crossing where the collision occurred. The cases holding that a failure in this respect is negligence *per se* are innumerable and that, too without any showing that the plaintiff knew of and relied on a compliance with this statutory provision, as might not be true of one who recently came from another State. So too, for that matter, there are many cases holding that a violation of a city ordinance regulating speed or requiring certain signals establishes negligence *per se* without reference to plaintiff's knowledge of or reliance on the same. [Hamm v. Unit d Railways, 184 Mo. App. 5, 12, 167 S. W. 1070; Dey v. United Railways, 140 Mo. App. 461, 120 S. W. 134; Yonkers v. Railroad, 182 Mo. App. 558, 562, 168 S. W. 307.] It may well be questioned whether plaintiff's knowledge of and reliance on such ordinance regulations does not, in all cases, merely affect the question of his contributory negligence rather than absolve the defendant from negligence. The breach of an established custom as well as of an ordinance or statutory regulation or requirement is negligence *per se* on the part of the one committing the breach and the knowledge of such custom or ordinance and reliance on same becomes important only when such custom or ordinance is invoked to excuse the conduct, otherwise negligent, of one seeking to recover for such negligence. This is true because negligence, contributory or otherwise, is determined from the view point of the actor. In pleading it is generally sufficient to plead the duty imposed by law or custom and its breach with resultant injury. Contributory negligence is a defense. A plaintiff may, as did plaintiff here, anticipate the defense of contributory negligence and plead the facts which rebut or excuse the same. It is generally suffi-

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cient, however. when negligence, contributory or otherwise, is charged for the other party to simply deny the same and one may prove without pleading the particular facts which rebut or excuse negligence.

In the present case the plaintiff plead and proved defendant's negligence in failing to give the statutory signals and his consequent injury. He is therefore entitled to recover, Weigman v. Railroad, 223 Mo. 699, 721, 123 S. W. 38, unless the evidence shows his contributory negligence so clearly that reasonable minds can draw no other reasonable conclusion. [Yonkers v. Railroad, 182 Mo. App. 558, 577, 168 S. W. 307.] We need, therefore, only consider the failure of the electric gong to give the customary warning along with the other facts, such as the obstruction to sight and hearing, as bearing on the question of plaintiff's contributory negligence.

The facts stated favorably to plaintiff, mostly drawn from his own evidence, are that he was going east on Eight Street in his Ford automobile at a speed of ten to twelve miles per hour. He was acquainted with the surroundings at this crossing and when he reached the intersection of Jackson Avenue, a north and south street, and being then some seventy-five feet from the crossing in question, he slowed down to eight miles per hour, or as he later stated, six to eight miles. There was a house on the fifty foot lot between Jackson Avenue and defendant's right of way which faced north and covered nearly the entire front of this lot. Oother houses were to the rear of this one. This obstructed plaintiff's view of defendant's track to the south and southeast. As plaintiff approached defendant's track he says he listened and heard no signals or sound of a coming train and noted that the crossing gong was not ringing. This induced him to believe that no train was approaching and he proceeded at that speed. He says that he, nevertheless, looked to the left or north and saw that no train was coming from that direction and, as soon as he passed the house on his right, he looked down the track southeast and saw the fast coming train then near the alley in the

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middle of the block, 150 or 160 feet distant. Plaintiff was then twenty to twenty-five feet from the track. That he looked down the track as soon as he could is shown by the fact that he saw the train by looking between the house and a tree and post only four or five feet from the house. Plaintiff says that he then shut off the power, applied the foot brake and lowered his speed in going the next ten or fifteen feet to about five miles per hour; that he was much excited and, fearing that he would stop on or too near the track or run into the train, he then put his car in low speed and undertook to cross in front of the coming engine, which he nearly succeeded in doing. He thinks he was within five to eight feet of the west rail when he changed his car to low gear and tried to cross in front of the engine. He says that he was excited and did not know what to do; that he was afraid he would not stop in time and concluded to try to cross. Plaintiff further testified that under ordinary circumstances, that is when no train was coming and he was not excited and knew just what to do and when to do it, he could stop his car in ten to fifteen feet when going at six to eight miles per hour. Another witness thought it could be stopped in about eight feet. Plaintiff did not attempt to use the emergency brake and says he did not usually use that one in stopping and is not sure that it would stop any quicker. The train was running thirty-five miles per hour, as stated by a witness, and this is corroborated by the fact that the engine ran some five or six hundred feet beyond the point of collision before stopping.

From all this we may reasonably draw the inference that plaintiff, though he looked down the track for a train as soon as he passed the obstruction, yet, because of the absence of both the train signals and the ringing of the crossing gong, he did not in fact expect to see a train, at least so very close; that in his excitement he did not act instantly. It takes time to receive impressions and act on them. [Burge v. Railroad, 244 Mo. 76, 101, 148 S. W. 925; McGee v. Railroad, 214 Mo. 530, 543, 114 S. W. 33.] One cannot control or stop an auto-

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mobile as quickly and accurately as he can control his person in walking. [Hamm v. United Railways, 184 Mo. App. 5, 12, 167 S. W. 1070.] The front of the automobile was some five feet further forward than the plaintiff and, if it took plaintiff a single second to act after he caught the first impression of the train, the front of the automobile was then within fifteen feet of the track. If he went, say, eight feet further in trying to stop and had not yet stopped, might he not conclude that he had best try to get clear across? Whatever he did at this time was an impulse rather than any intelligent action.

We are bound to take these facts as testified to by plaintiff as true unless same are impossible or contrary to the physical facts. We will grant that plaintiff had no right to blindly rely on the absence of signals as showing a clear track [Yonkers v. Railroad, 182 Mo. App. 558, 576 (and 579 dissenting opinion) 168 S. W. 307; 3 Elliott on Railroads, secs. 1157, 1165]; but must nevertheless use his eyes and ears to discover a train before passing onto the track. [Edwards v. Railroad, 94 Mo. App. 36, 44, 67 S. W. 950; Hamm v. Railroad, 184 Mo. App. 5, 12, 167 S. W. 1070; Blaine v. Railroad, 184 S. W. 1142; Schmidt v. Railroad, 191 Mo. 215, 90 S. W. 136; Blount v. Railroad, 61 Fed. 375; Jacobs v. Railroad (Kans.), 154 Pac. 1025; Headley v. Railroad (Colo.), 154 Pac. 731; McSweeney v. Railroad, 87 N. Y. S. 836.] Plaintiff says that he did all this; that he did not hear any train because the accustomed and required signals were silent; that he did see the train practically as soon as he could; that he then did the best he could under the stress of the impending peril. We see no reason for rejecting as impossible or contrary to the physical facts plaintiff's statement that he saw the train practically as soon as it was visible and was then only twenty to twenty-five feet from the track. Defendant's photograph shows a vision of thirty-eight feet but does not refute the charge then made that it was taken from the north side of Eighth Street where the zone of vision would be wider than on the south side where plaintiff was traveling. Plaintiff's photo-

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graphs corroborate his statement. It is suggested that if plaintiff had slowed down his speed to six or eight miles per hour (plaintiff gave his best impression as being eight miles per hour), and then went ten to fifteen feet with the brake on, the speed would be lowered to less than five miles per hour. But these distances and speeds are merely plaintiff's best impressions formed under great excitement and peril. The jury would have a right to vary such speeds and distances two or three miles per hour or three or four feet respectively. The real question is, could the jury consistently find that plaintiff did exercise ordinary care in looking and listening for a train and, if so, that he did then use ordinary care to avert the threatened danger. we think it could.

It is probable that had plaintiff not changed his mind about stopping he could have done so before he reached the track, but we do not understand defendant to controvert the fact that he was then acting under excitement and peril and that the law does not require one under such circumstances to do, at his peril, the thing which afterwards appears to have been the safest. [Kleiber v. Railroad, 107 Mo. 240, 247, 17 S. W. 946; Wack v. Railroad, 175 Mo. App. 111, 125, 157 S. W. 1070; Weigman v. Railroad, 223 Mo. 699, 720, 123 S. W. 38; Hanna v. Railroad, 178 Mo. App. 281, 286, 165 S. W. 1148; Donohue v. Railroad, 91 Mo. 357, 364, 2 S. W. 424, 3 S. W. 848; Underwood v. Railroad, 190 Mo. App. 407, 418, 177 S. W. 724.] This principle is especially applicable where defendant has, by its neglect of duty and failure to give timely warning, lulled plaintiff into a sense of security and brought him unawares into the peril from which he seeks to extricate himself. [Edward v. Railroad, 94 Mo. App. 36, 45, 67 S. W. 950; Baker v. Railroad, 147 Mo. 140, 166, 48 S. W. 838; International & G. N. Railway v. Isaacs (Texas), 168 S. W. 872; Dickenson v. Railroad, 81 Atl. 104, 37 L. R. A. N. S. 150.]

It must also be kept in mind that from the time plaintiff first saw the train, being then only twenty to twenty-five feet from the crossing and the train only

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150 to 180 feet therefrom, only three or four seconds elapsed till the collision. This is a very short time within which to act, especially in excitement, and what has been said in favor of railroad engineers and other trainmen, in not requiring them to act instantly and with absolute precision and accuracy in averting a suddenly discovered peril, is equally applicable to the driver of an automobile and we refer, without repeating same, to what we said in Underwood v. Railroad, 182 Mo. App. 252, 168 S. W. 803, and the cases there quoted from. We think it clear that a court should not say as a matter of law that plaintiff was guilty of negligence in failing to use due care in discovering the coming train or in trying to avert a collision after its discovery.

The only other point is whether plaintiff was negligent in not bringing his car to such a low speed and having it under such control that he could have stopped same after discovering the train, regardless of the short distance between the point of discovery and the track, conceding, of course, that plaintiff knew the shortness of this distance. This at once recalls the proposition that plaintiffs hearing was unobstructed and that the train was not giving the dequired signals nor was the automatic crossing gong being sounded. Had no warning signals been expected by plaintiff or had he been deaf, then knowing that his sight was obstructed and that listening would do no good, the law might well have required him to observe the degree of caution and care just stated. We deny, however, that the same rule applies when plaintiff's hearing is not obstructed and defendant, by law and its own established custom known to and relied on by plaintiff, was required to give signals easily heard. The law relating to slowing down and putting one's means of locomotion in absolute control is analogous to that relating to stopping, for such slowing down is a partial stopping. The law does not require stopping when listening would be effectual on the supposition that defendant was doing its duty with reference to giving signals. We are not, of course, here speaking of such a high rate of speed as, under the

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circumstances, itself bespeaks negligence, for such speed should always be lowered. Looking and listening are so easily and readily accomplished that a failure to do so in entering upon a place of danger, such as a railroad track, is negligence, even when the absence of signals indicates a safe crossing. But stopping is not held essential unless both seeing and hearing are ineffectual without so doing. [Underwood v. Railroad, 182 Mo. App. 252, 262, 168 S. W. 803; Underwood v. Railroad, 190 Mo. App. 407, 415, 177 S. W. 724; Kelley v. Railroad, 88 Mo. 534, 547; Masters v. Railroad, 58 Mo. App. 572, 575, Campbell v. Railroad, 175 Mo. 161, 183, 75 S. W. 86.] In the Kelley case, supra, the court said: "We think it (the law), requires of him, where he cannot see the track, to listen and *if necessary for that purpose,* on account of the noise made by his wagon (or any other cause) to stop and listen for the train before venturing blindly upon it." In the Underwood case, supra, we reviewed the authorities and announced the rule that: "It is always a person's duty to look and listen when possible before entering on a railroad crossing. When stopping is *essential* to make looking and listening effectual, then stopping is necessary." Such, we think, is the rule with reference to so slackening the speed and placing the means of locomotion under absolute control when one is already traveling in an ordinarily slow and safe manner. [Moore v. Railroad, 157 Mo. App. 53, 66, 137 S. W. 5; Elliott v. Railroad, 105 Mo. App. 523, 532, 80 S. W. 270.] If, as is often asserted, the vigilance and caution required in approaching danger must be proportionate to the apparent danger, it follows that one may relax his vigilance and caution when all the signs or lack of signals indicate no danger. As said in Kenny v. Railroad, 105 Mo. 270, 15 S. W. 938, where the facts were similar except that only the statutory signals were omitted, "he was under no legal obligation to shape his action on the theory that defendant would disregard the plain requirements of law respecting a signal of its coming train." In the recent case of Jackson v. Railroad, 189 S. W. 381, the facts showed that the plaintiff,

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traveling on a motorcycle, approached a crossing with which he was familiar where his view was obstructed till within thirty to fifty feet of the crossing. His hearing not being obstructed he slowed down and listened and looked as soon as he could, but did not slow down and put his motorcycle under control to the extent that he could stop after the car became visible. That court held that he was not guilty of contributory negligence as a matter of law, and said: "It is clear that this warning would be of little utility unless the traveler for whose benefit it is designed is permitted to profit by it. If, in very case which the traveler upon a public highway approaches a railroad crossing and can hear no warning because no train is approaching, he must act in all respects as if there were no law requiring such notice, that law must be a dead letter to him. Should he hear the train he must stop and let it pass. Should he not hear it he must still assume it is there, coming stealthily like a criminal to take his life. This is, of course, not the law; but the statutory duty is, in every such case, an element of the situation in determing the question of negligence between the parties to an accident of this character. It is true that the law requires the traveler to anticipate that the company may fail to give the statutory signals, and to act upon that theory; just as it requires the railroad company to anticipate that the traveler will fail to hear or disregard the signal when given, and to keep reasonable watch for such instances, and be prepared to protect those guilty of such carelessness. These duties are *equal* and *reciprocal,* and extend no further than does the humane principal in which they have their origin, for the law is no respector of persons. While the duty of watchfulness on the part of the railway does not include the duty to *stop or moderate the speed of its train* until danger appears, and thereby injure the public service in anticipation of a possible wrong, so the *same* benign principle is applied to the *traveler* who, while in duty bound to be watchful and cautious, is not under obligation until the necessity appears, to sur-

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render to a possible wrongdoer all the benefits which the law is intended to confer." To the same effect is the Underwood Case, 190 Mo. App. 401, 416, 177 S. W. 724. Burnett v. Railroad, 172 Mo. App. 51, 59, 154 S. W. 1155, quotes from Virginia case that: "He must not approach the track at such a rate of speed that when he reaches the point where he can see or *hear* the train itself, it is too late to protect himself from injury." Yonkers v. Railroad, 182 Mo. App. 558, 568, 168 S. W. 307 says: "The fact that the gates were maintained, and that they were open at this particular time, necessarily constituted an invitation to one to pass upon or over the defendant's tracks. It was essentially an assurance to plaintiff, driving upon the street, that no danger need be feared from an approaching train. While it may be true that she was not so far relieved of the duty to look and listen that she could go blindly and heedlessly upon the tracks, relying wholly upon the fact that the gates were not closed, nevertheless her duty to look and listen is to be regarded as modified, to a great extent at least, by the fact that the open gates constituted an invitation to go upon the tracks and assurance of safety on so doing." Many cases are cited supporting this proposition. It may be true, as suggested, that gates and devices operated by human intelligence are more to be relied on than automatic devices, but the difference is one of degree only, and is for the jury. The law accords with common experience and reason that persons approaching a railroad crossing when the view is obstructed depend on the sense of hearing to inform them of approaching trains and this hearing includes the hearing of such warning signals as law or custom or both require. And in such a case, when a person is regulating his speed and conduct so as to make hearing effectual and listens attentively and hears no train, because of defendant's fault in not giving the required signals, then he may proceed at an ordinarily safe speed on the theory that the crossing is safe; and where the evidence tends to show that he did this, the court cannot declare him

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guilty of contributory negligence. [Moore v. Railroad, 157 Mo. App. 53, 66; 137 S. W. 5; Weller v. Railroad, 120 Mo. 635, 652, 23 S. W. 1061, 25 S. W. 532; Petty v. Railway, 88 Mo. 306, 318; Donohue v. Railroad, 91 Mo. 357, 363, 2 S. W. 424, 3 S. W. 848; Kennayde v. Railroad, 45 Mo. 255; Lueders v. Railroad, 253 Mo. 97, 161 S. W. 1159; Montgomery v. Railroad, 181 Mo. 477, 500, 79 S. W. 930.] In the present case the plaintiff says he listened attentively for the statutory signals required of an approaching train and for the ringing of the crossing gong indicating the same thing, and having this double assurance that no train was approaching, his act in approaching the crossing at six to eight miles per hour cannot be declared negligence as a matter of law.

It was suggested at the argument that the evidence does not show that the crossing gong, if ringing, would have commenced ringing sooner than plaintiff saw the train; but we think it fair to defendant to say that, since it maintained this warning device at this otherwise dangerous crossing in order to warn the ordinary traveler thereon, that same was so constructed as to reasonably accomplish that purpose and was not so constructed as to warn when warning would do no good.

The cause will therefore be reversed and remanded. *Cov, P. J.*, and *Farrington, J.*, concur.

TENNIE F. DAVIS, Respondent, v. THE NATIONAL COUNCIL OF THE KNIGHTS AND LADIES OF SECURITY, Appellant.

Springfield Court of Appeals, June 23, 1917.

1. **MUTUAL BENEFIT INSURANCE SOCIETIES: Waiver of Laws by Officers: Statutory Powers to Prevent.** A mutual benefit society may by its constitution and by-laws under our statutes provide that none of its subordinate bodies nor its officers or members thereof shall

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have power or authority to waive any of the provisions of the laws and constitution of the society. (Laws 1911, p. 292, sec. 22.)

2. **PRINCIPAL AND AGENT: What Law Governs Question of Agency.** The courts of every State and jurisdiction, either with or without the aid of some statute, deal with the question of agency under the general law and each court decides for its own jurisdiction what facts constitute one person the agent of another and the extent and limitations of the agents powers.

3. **MUTUAL BENEFIT INSURANCE SOCIETIES: Waivers: Provision Against by Constitution: Applicable to Foreign Corporations.** The statutory provisions (Laws 1911, p. 292, sec. 22) permitting mutual benefit societies to prohibit waivers by a subordinate lodge or its officers govern in actions brought in this State against foreign corporations regardless of the fact that the State where such foreign corporation was created recognizes such waivers.

4. **INSTRUCTIONS: Mutual Benefit Societies: Insurance: Waiver: Forfeiture.** In an action against a mutual benefit fraternal society the jury was instructed that if the society accepted overdue premiums and retained them after knowing of the bad health of the insured, such retention was a waiver of the forfeiture provision. The instruction was erroneous because it did not limit such action to the national council and its officers instead of the local organization.

5. **MUTUAL BENEFIT SOCIETIES: Insurance: By-law Provisions: Constructions.** Defendant mutual benefit society had a by-law providing that the retaining of an assessment should not waive any by-law provision until demand had been made for the return of the premium. Such provision only authorized retaining such payment during sufficient time for a reasonable investigation of facts.

6. ———: ———: **Forfeiture: Waiver by Retaining Payment.** Where the governing body of a mutual benefit society retained an assessment for several months and did not offer to return same, with full knowledge of the facts all the while, it thereby waived a provision forfeiting policies for failure to pay assessments promptly.

7. **INSURANCE: Mutual Benefit Societies: Waiver as to By-law Provision.** When a waiver is once made by a mutual benefit society as to provisions in its by-laws such waiver cannot be recalled.

Appeal from Jasper County Circuit Court, Division Number two.—*Hon. David E. Blair,* Judge.

AFFIRMED.

James P. Mead for appellant.

Owen & Davis for respondent.

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STURGIS, J.—The defendant, as its name indicates, is a fraternal benefit association organized under the laws of Kansas and authorized to do business in this State under the provisions of Laws of Missouri 1911, pages 284 to 301. This suit is brought by the beneficiary on a benefit certificate issued by defendant on the life of Ibb P. Forney, plaintiff's son, dated August 24, 1911. The deceased was a member of a local lodge or "council" of the defendant order at Joplin, Missouri. He died on February 1, 1916; proofs of death were furnished the defendant about March 1, 1916, and this suit was filed May 18, 1916, and tried at the October term, 1916, of the Jasper County Circuit Court. The plaintiff recovered and defendant appealed.

The defense relied on is that deceased was not a member of defendant order in good standing at the time of his death because of his failure to pay in due time the monthly assessment for October, 1915. The defendant's by-laws, which are made a part of the benefit certificates issued by it, makes the monthly assessments due on the first day of each calendar month and then provide that if any such assessment is not paid on or before the last day of such month the member's certificate shall, without notice or any action taken to that end, be suspended and all rights thereunder forfeited; that no right under a suspended certificate shall be restored until the member is reinstated in compliance with the laws of the order. The laws of the order in this respect provide for reinstatement within sixty days after suspension by paying all arrearages, "Provided, however, that he (the member) be in good health at the time of making payment." By the act of payment the member is made to warrant that he is in good health.

It is conceded that the October, 1915, dues were not paid during that month but were paid on November 3, following, to the financier of the local council, and transmitted in due course to the head office or national council. It is also admitted that the deceased member was not then in good health, but was confined in the State hospital for the insane at Nevada, Missouri,

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which affliction resulted in his death. These facts as to the member's health were known to the officers of the local council, inclusive of the financier, who accepted his delinquent dues. No notice of such delinquency was given to the national council or its officers till after deceased's death. In the meantime the monthly dues for November, December and January were paid in proper time. The February dues were paid after the member's death and transmitted with the proofs of death.

The proofs of death sent to the home office, made on forms provided for that purpose, disclosed that the October dues of this member were not paid till November 3, and that all subsequent dues had been paid in proper time. The October delinquency was also referred to in the answer to the questions as to suspensions and reinstatements. The attending physician's affidavit, forming part of the proof of death, disclosed that deceased died in the insane asylum and that this physician had treated him there since August, 1915, for "general paresis;" that the patient was first admitted to that institution December 4, 1913. The claimant's affidavit accompanying the proofs of death also stated that the deceased's health began failing in the "fall of 1914."

The plaintiff concedes the validity of the requirement that the dues and assessments of members be paid within a specified period and that the benefit certificate in question and all plaintiff's rights thereunder became *ipso facto* forfeited by the nonpayment of the October, 1915, dues, within that month. The plaintiff's contention is that such certificate was reinstated by the payment on the member's behalf and the receipt by defendant of such delinquent dues on November 3, notwithstanding the member was then in bad health, because defendant accepted such delinquent dues with knowledge that the member making the payment was not in good health and by so doing the defendant waived the delinquency in the payment and any forfeiture based thereon. A like proposition is predicated upon the receipt by defendant

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of the subsequent dues for November, December, Janu- possessed by defendant, on which such waiver is based ary and February following. The knowledge, if any, and which is the *sine qua non* thereof, is that imputed to it from the knowledge possessed by the financier of the local lodge.

The plaintiff cites many cases supporting the affirmative of the much question as to what extent and for what purpose the local lodge and its officers are agents of the head or grand lodge of such orders, and whether such agents have power to waive the provisions of the by-laws enacted by the governing body. We do not find it necessary to attempt to reconcile the seemingly conflicting decisions of this and other jurisdictions on this question. We may say that there is much reason for holding that where the superior body entrusts the collection of all the dues from the members to particular officers of the local lodges and designates them as the persons to whom the members shall pay their dues and assessments and who shall transmit same to the head office, then such lodge officer is the agent of the head or grand lodge in regard to receiving and forwarding to the head office the dues of the members. Any payment of such dues to the subordinate lodge officer charged with such duty is a payment to the superior body and the member is not responsible for such agent's default or miscarriage. [Howard v. Bankers' Union of the World, 94 Mo. App. 442, 450; Andre v. Modern Woodmen, 102 Mo. App. 377, 76 S. W. 710.] Where the governing body by a long course of conduct, showing knowledge permits its collecting agents to receive dues for members out of time, then it may be held to have waived strict payment, but such waiver is that of the superior lodge itself. [McMahon v. Maccabees, 151 Mo. 522, 52 S. W. 384; Boyce v. Royal Circle, 99 Mo. App. 349, 73 S. W. 300.] But the power of such an agent, whose duty is simple and ministerial—a sort of dumb waiter in receiving and transmitting the money—to waive the provisions of the by-laws enacter by the governing body or whose un-

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communicated knowledge is imputed to the governing body and becomes the basis of an estoppel to enforce such by-laws, is a very different proposition. That the financial collector of the subordinate lodge or "council" is not an agent of the grand lodge or "National Council" with such extensive powers, where the by-laws forming part of the insurance contract provide, as is the case here, that no member or officer of the local lodge has power to waive the provisions of the contract, has been ruled in this State many times. [Thompson v. M. B. A., 189 Mo. App. 15, 176 S. W. 506; Borgraefe v. Knights & Ladies of Honor, 22 Mo. App. 127; Lavin v. Grand Lodge, 104 Mo. App. 1, 78 S. W. 325; State ex rel. v. Temperance Ben. Soc., 42 Mo. App. 485; Chadwick v. Triple Alliance, 56 Mo. App. 463; Day v. Supreme Forest, 174 Mo. App. 260, 156 S. W. 721; Lavin v. Grand Lodge, 112 Mo. App. 1, 86 S. W. 600; Clark v. Royal Arcanum, 172 Mo. App. 709, 155 S. W. 892; Brittenham v. W. O. W., 180 Mo. App. 523, 534, 167 S. W. 587 Burke v. Grand Lodge, 136 Mo. App. 450, 457, 118 S. W. 493; Knode v. M. W. A., 171 Mo. App. 377, 157 S. W. 818; Gilmore v. Brotherhood, 186 Mo. App. 445, 171 S. W. 629; Griffith v. Royal Arcanum, 182 Mo. App. 644, 166 S. W. 324.] Such, too, is the law in many other jurisdictions as shown by Royal Highlanders v. Scovell (Neb.), 4 L. R. A. N. S. 421 and cases cited in the editorial note.

This question, so far as it is involved here, is put as rest in this State by the enactment of section 22, Laws 1911, page 292, as follows: "The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power (s) or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members." The defendant's by-laws, which were put in evidence, are fully as restrictive in limiting the powers of the subordinate lodges and their officers as this statute permits.

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Plaintiff seeks to escape the force and effect of the above statute by showing, as she did, that defendant is a corporation organized under the laws of Kansas and that that State has no similar statute; that the common law is in force in Kansas by statute and that the law of that State, as shown by the decisions of the Supreme thereof, is that the subordinate lodge and its officers are agents of the grand lodge and have power to waive provisions of the by-laws by receiving delinquent dues of members knowing that the paying member had not complied with such by-laws. This may be conceded. [Pyramids v. Drake, 66 Kas. 538, 72 Pac. 239; Mayes v. K. & L. of S. (Kas.), 142 Pac. 290; Fraternal Aid Ass'n v. Powers, 67 Kas. 420, 73 Pac. 65; Benefit Society v. Wood, 78 Kas. 812, 98 Pac. 219.] It is then argued that every foreign corporation is restricted in its power by its charter provisions and the laws of the State of its creation which become part of the charter. [5 Thompson on Corporations, sec. 6627.] This is good law but does it apply to the question at issue? We do not think that any decision of this State either way on this question of agency in any way affects the limitation of defendant's charter powers. The courts of every State and jurisdiction, either with or without the said of some statute, deals with questions of agency under the general law and each court decides for its own jurisdiction what facts constitute one person the agent of another and the extent and limitations of the agent's powers. The courts of Kansas, as will be seen from the above cases, have dealt with this question as a question of general law applicable alike to domestic and foreign corporations doing business there, unhmpered except, perhaps, as persuasive authority, by the decisions of the State of the particular corporation's origin. So the courts of this State have always dealt with this question as one of general law applicable alike to foreign or domestic corporations where the contract is a Missouri contract; and it is a novel proposition to say that the courts of each State must decide this question of agency, not

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uniformly, as a general proposition of law, but differently as determined by the domicile of each fraternal benefit society licensed to do business in this State and the solution given to such question by the courts of the particular State of such domicile. The precise question at issue may not have been presented to any court of this State, but ever since the enactment of the Law of 1911, supra, all our courts have uniformly held that section 22 is applicable to all fraternal benefit societies licensed to do business in this State under the provisions of such act, regardless of the views of the courts of the particular State where such corporation is organized on this question of agency. [Hartmann v. K. & L. of S., 190 Mo. App. 92, 175 S. W. 212; Thompson v. M. B. A., 189 Mo. App. 15, 18, 176 S. W. 506; Gilmore v. M. B. A., 186 Mo. App. 445, 452, 171 S. W. 629; Brittenham v. W. O. W., 180 Mo. App. 523, 534, 167 S. W. 587.] In the Hartmann case, supra, the court was dealing with the by-laws of the present defendant and the power of the officer of the local council to waive same because of his knowledge of the facts and the court held: "By the general language used in the sixth instruction and in the additions made by the court to the two asked by defendant, the court told the jury that if they found that 'defendant received, accepted and retained dues,' etc., with full knowledge of Hartmann's occupation, it was estopped, etc. From this the jury may have found that the knowledge of the local council and its officers and members, was the knowledge of the defendant. Under the constitution and by-laws of this order, or subordinate lodge nor any of its officers could waive any provision of the order. This is the law in this class of cases. Knowledge, under the by-laws and constitution, must be brought home to the general officers or governing body. [Section 22, Acts 1911, p. 292.]" In the Thompson case, supra, the court said: "The power to thus expressly limit the authority of subordinate lodges, whether considered as agents of the association or of the insured, is granted by section 22 of the Act of March 30, 1911, re-

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lating to fraternal beneficiary associations. [Laws 1911, page 212.] It follows, therefore, that mere knowledge on the part of the subordinate lodge of Thompson's business and the acceptance by that lodge of his premiums with such knowledge, would not constitute a waiver of the forfeiture unless there was evidence from which the trier of fact could reasonably infer that the supreme lodge or some one of its general officers, knew the facts or was aware of that course of conduct."

The trial court, therefore, erred in instructing the jury that if the financier of the local council knew of the bad health of the deceased at the time of collecting the delinquent dues for October, 1915, then her knowledge would be the knowledge of the defendant and the defendant thereby waived its by-laws requiring payment of such dues during current month and is estopped to plead a forfeiture of the benefit certificate sued on. A like error is found in the instruction basing a waiver and estoppel on the fact that the financier of the local lodge thereafter collected the December and January dues of the deceased member after receiving knowledge of his bad health.

Plaintiff's first instruction is also erroneous in predicating plaintiff's right to recover on a finding that "Forney or plaintiff paid to defendant all dues and assessments levied and assessed by defendant against him up to the time of his death" without regard to when same were paid or whether prompt payment was waived. Plaintiff can recover only by proving a waiver.

Knowledge of the fact that the deceased member had defaulted in the payment of his October dues and thereby forfeited his insurance and that he had attempted to reinstate such insurance by making payment on November 3, which could not lawfully be done because of his then bad health, was first brought home to the defendant's governing body by the proofs of such member's death received shortly after March 1, 1916. The jury was instructed, at plaintiff's instance, that though the defendant accepted the October dues paid

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out of time without knowledge of the member's bad health at the time of payment, yet if the defendant after acquiring such information, retained such assessment or did not offer to refund same, then such retention amounted to a ratification of the collection of said assessment out of time and a waiver of any forfeiture. This instruction does not, as it should, limit the knowledge which has the effect declared to that of the national council and its officers rather than the local lodge.

When so limited, we think the evidence conclusively shows a waiver by such governing body. That it was the duty of the defendant to return the dues collected after the forfeiture of the policy will be conceded. Whether a waiver of the forfeiture can be predicated on such failure depends on the facts of the particular case. One of defendant's by-laws which, as we have seen, is part of the insurance contract, provides: "The retention by the Financier or by the Order of assessments and dues paid by members or for them with a view to reinstatement other than as provided in the Laws of the Order, either before or after death, shall not constitute a waiver of any provisions of these Laws until a demand has been duly made for their return by such member, or his beneficiary, or legal representative." No request was made by plaintiff or anyone for any return of the assessments paid and it does not appear whether plaintiff waited for a final rejection of the claim or not before bringing suit. But such by-laws can only authorize a retention of such payments a sufficient time for reasonable investigation of the facts. [Godwin v. K. L. of S., 166 Mo. App. 289, 297, 148 S. W. 980.] Suit was filed May 18th, about two and a half months after the proofs of death were furnished. There was no administrator to whom the money could be paid on behalf of deceased's estate, but the by-laws contemplate that the same may be returned to the beneficiary. Moreover, the defendant suggests as a defense, and therefore had knowledge of the fact, that the beneficiary paid these dues in order to keep the policy in force in her own favor. Whether the defendant waived the delin-

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quency in question must be determined by its attitude in the matter as shown by its acts. If, after the proofs of death were received and it knew of the member's delinquency and subsequent payment of dues and assessments, then if it determined to retain and appropriate the premiums and treat the benefit certificate as being in force it must be held to have waived any forfeiture. This it did do, for it has never yet tendered back these dues to anyone. The defendant did not intend to and was not seeking an opportunity to pay back these assessments for October to February, inclusive, as soon as the facts of the alleged forfeiture became known to it. This case was not tried until October, 1916, and defendant filed an answer in September, 1916, setting up the defense of forfeiture and at no time has it tendered by its pleadings or into court the amount should and must be repaid as a condition precedent to any judgment in its favor. The defendant cannot be allowed to retain the dues paid by or on behalf of the insured and at the same time successfully make a defense based on the nonpayment of such dues in proper time. Had the defendant been permitted to defeat this suit on this defense it would now be in the position of having defeated the insurance and yet be holding the dues which, by being paid and retained by defendant, kept the insurance in full force at the member's death. These dues should, at least, have been paid into court for whomsoever was entitled thereto. Not having done so, the defense of waiver is out of the case and we will not reverse and remand same in order to allow defendant to do what it should have done before the trial. When a waiver is once made it cannot be recalled. [Thompson v. M. B. A., 189 Mo. App. 15, 22, 176 S. W. 606; Bell v. Insurance Co., 166 Mo. App. 390, 402, 149 S. W. 33; Rhodus v. Insurance Co., 156 Mo. App. 281, 285, 137 S. W. 907; Keys v. National Council, 174 Mo. App. 671, 161 S. W. 345.]

The judgment in this case is therefore for the right party and the only judgment which the undisputed facts

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permit. The errors committed by the trial court become of no importance as to the result in this case, and the judgment is affirmed. *Cox, P. J.*, and *Farrington, J.*, concur.

BANK OF NEELYVILLE, A Corporation, Respondent, v. ALBERT LEE, G. C. STOUT, R. M. ABERNATHY, W. L. BIGGS, and R. M. LOURY, Appellants.

Springfield Court of Appeals, June 23, 1917.

1. **BILLS AND NOTES: Principal and Surety: When Surety Released by Act of Creditor.** Where a creditor gives a surety to understand that he will look to the principal debtor alone for payment, thereby causing the surety to forego taking security to protect himself and loss results to him, the surety is released.

2. **ESTOPPEL: Applicable to Accommodation Makers and Indorsers of Note.** The doctrine and principles of estoppel apply to release signers of a note whether they are, under the Negotiable Instrutruments Law, accomodation makers or indorsers.

3. **BILLS AND NOTES: Release of Sureties: Authority of Bank Cashier.** A bank cashier has no authority to release a surety on a note by mere contract or promise, but such bank may be estopped to collect from such surety by reason of the acts and representations of its cashier made in line of his duty.

4. **BANKS AND BANKING: Bank Estopped by Cashier's Statements.** The cashier of a bank represented to sureties on a note who intended to take steps to secure themselves, that such steps were not necessary as the bank had taken a mortgage amply sufficient to secure all parties. The bank was estopped by the cashier's statements.

5. **BILLS AND NOTES: Principal and Surety: Surety Released: To What Extent.** Where sureties on a note were released from liability to a bank because of statements of the cashier which caused them to refrain from taking securities to protect themselves, they were released only to the extent to which they were damaged by being caused to refrain from taking security such as they could have obtained from the principal debtor.

6. ———: ———: **Release of Surety: To What Extent.** The cashier of a bank represented to sureties on a note which it held that the

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bank had taken a mortgage which amply secured the notes. The mortgage was not enforced against all the property covered by it and the proceeds were not applied in payment of the debts secured. The securities were released to the extent of their loss occasioned thereby.

Appeal from Butler County Circuit Court.—*Hon. J. P. Foard,* Judge.

REVERSED AND REMANDED.

Abington & Phillips for appellants.

W. A. Welker and *David W. Hill* for respondent.

STURGIS, J.—This is a suit on a promissory note for $363.05 executed to defendant Loury by the other defendants and by him endorsed to the plaintiff bank. It is a companion case to those of Bank v. Lee et al., 182 Mo. App. 185, 168 S. W. 796 and Bank v. Lee, 193 Mo. App. 537, 182 S. W. 1016, and grows out of much the same facts. Each of said suits, however, is on different notes.

It is conceded that these notes were given for the benefit of Lee, who was in fact borrowing the money from the plaintiff bank. There is no question as to Lee's liability and here, as in the other cases, the other defendants seek to be released by reason of the conduct and representations made by the bank through its cashier, by which they were caused or induced not to take security for their own protection from the principal debtor, Lee. In the first of these cases this court held that, where a creditor gives a surety to understand that he will look to the principal debtor alone for payment, thereby causing the surety to forego taking security to protect himself resulting in his loss, the surety is released. In so doing we applied the principle of estoppel and released part of the then defendants and held others. One of the parties then released, W. L. Biggs, is a defendant here. In the second case, a demurrer having been sustained to the answer, we ruled that the

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doctrine and principles of estoppel would apply to release signers of a note whether they were, under the negotiable instruments law, accomodation makers or endorsers.

In the present case of pleadings are practically the same as in the other two cases, in the latter of which the answer is set out in full and held to state a good defense. During the course of the present trial the defendant Biggs, who had signed the note in suit as an accommodation maker, testified that he had signed two other notes for Mr. Lee which were held by the bank; that he thought these other notes had been paid but learned different; that he then went to the bank to see about getting these notes "straightened up;" that he saw the cashier and told him that he and the other sureties intended to get Lee to give a mortgage to secure him and the others against loss on these notes; that a little later he again talked with the cashier. Objection being made that the statements of the cashier would not be binding on the bank, the defendant then offered to prove by this witness "that on the date mentioned, between the 25th of January and the first of February, 1912, that in a conversation with Mr. Welker (cashier) in the bank of Neelyville, while George Stout was present, he stated to Welker that he (Biggs) and the other sureties of Albert Lee were intending to take such steps as might be necessary to secure themselves against loss; that Welker, the cashier, stated to him and Mr. Stout that it wasn't necessary for them to do so, and to rest easy because he had taken a chattel mortgage on all Albert Lee's property, in which chattel mortgage was property enough to secure them against loss on this note in suit and other notes, and that if Albert Lee didn't pay this note in suit when it was due the bank intended to make payment out of the property in the chattel mortgage, and wouldn't look to these sureties; that these sureties, relying upon the representations of Welker then and there made, took no security at all to protect themselves against loss, and that in the meantime Albert Lee

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became insolvent." Offers to prove similar facts by other witnesses were also made. The court excluded this evidence on the objection that the cashier of a bank had no authority to make any such arrangement and that same was not binding on the bank, the court remarking: "I think these cases hold that the authority—that the cashier must be shown to be given special authority, to make this evidence competent; any agreement by the cashier to release, or which would work a release by estoppel, would have to be made by special authority." The court afterwards refused to submit any defense to the jury and left nothing for it to do except calculate the interest and render a verdict in plaintiff's favor. A judgment being entered against all of the defendants they have taken proper steps to have the case reviewed by this court.

The authorities submitted to the trial court and on which he based his ruling are, Daviess Co. Sav. Assoc. v. Sailer, et al., 63 Mo. 24 and Savings Bank v. Hughes, 62 Mo. App. 576. The question of the authority of the bank cashier to do and say the things which are alleged to be binding on it and to release the endorsers and accommodation makers, whether by way of agreement or estoppel, was not presented on either of the former appeals. It was then assumed by all the parties that the statements and representations made by the cashier were binding on the bank by way of estoppel at least. It is claimed that the above authorities hold to the contrary, but we think not. We may readily agree that a cashier of the bank has not the authority by mere contract or promise to release a party to a note held by the bank since his authority is to collect such notes and not to release them. But to hold that no estoppel arises against a bank by reason of the acts or representations of its cashier, made in the line of his customary duties and authority, which has misled and caused another to change his situation for the worse, as to forego or release some right which he otherwise would not have done, is contrary to the fundamental principles of estoppel. [32 Cyc. 214.] The

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cashier of the bank was entrusted with the power and duty to collect its notes and was, at the time, looking after the collection of the Lee notes of which this is one. He is the chief executive officer of the bank. He had authority to take security for these notes and did so, though it appeared in another case that he took a mortgage on some $4000 worth of property to secure a single note for about $500. His representation that this mortgage was taken to secure and did amply secure all these notes was clearly made in the line of his duty and apparent authority. To whom else than the cashier would a surety go to ascertain the status of a note on which he was liable? To hold that the surety had no right to rely and act on what the cashier told him is contrary to reason and common experience. [Michie on Banks and Banking, p. 802, sec. 113; Barnes v. Saving Bank (Ia.), 144 N. W. 367, 379.]

That a bank may be and frequently is estopped by the acts and representations or even omissions of its cashier of other officer from asserting or enforcing claims which it otherwise would have, is held in many cases. In Bank v. Lillard, 55 Mo. App. 675, where the cashier of a bank had innocently taken a forged note as a renewal note and some time later, discovering the forgery, attempted to collect from a surety on the genuine note, it being shown that when such genuine note became due the principal was solvent but later became insolvent, the court said: "If plaintiff's act in surrendering the note to the principal debtor cancelled and marked paid, caused these surety defendants to *forego or forbear* securing or indemnifying themselves from the principal debtor, in consequence of which forbearance they have lost available recourse on him by reason of his insolvency, they are discharged, regardless of any negligence on the part of plaintiff. If the plaintiff has thus caused them to forego taking security or indemnifying themselves when they otherwise would have done so, then in such case plaintiff's utmost care and prudence would be no answer to the injury done the sureties. Both parties in such case are

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innocent, but plaintiff is the party, notwithstanding, who caused the injury and must be the one to bear the burden of such injury. We have had occasion to pass upon the general proposition of law as to the release of sureties under kindred conditions to those now presented. We here state what we understand it to be. When a creditor who knows that one occupies the relation of surety to the principal debtor notifies such surety that the debt is paid, or cancels the debt, the surety being apprised thereof, and in consequence of such notice or cancellation changes his situation, as by surrendering security, or refraining from taking security which he could have taken and which he *otherwise would have taken,* he is discharged. [Triplett v. Randolph, 46 Mo. App. 569; Driskell v. Mateer, 31 Mo. 325; Carpenter v. King, 9 Met. 517.]" [See, also, Bank v. Danckmeyer, 70 Mo. App. 168; Bank v. Hardesty (Ky.), 91 S. W. 729; Hickock v. Farmers' & Mechanics' Bank, 35 Vt. 476; Bank of Polk v. Wood, 186 S. W. 1186; Hobbs v. Boatright, 195 Mo. 693, 728, 93 S. W. 934.]

The case of Savings Bank v. Hughes, 62 Mo. App. 576, relied on by plaintiff, goes no further than to hold that a bank cashier had no authority to discharge by *contract* a surety on a note without receiving payment. The discharge there claimed was based on a statement or promise by the cashier that, if the surety would aid the bank in getting security on another note to which he was not a party, the bank would release such surety from the note on which he was liable. There was no claim that the surety had been induced to refrain from protecting himself or that he was injured in any way. There is no estoppel in that case. The syllabus of the case of Daviess Co. Sav. Association v. Sailer, 63 Mo. 24, relied on by plaintiff, is somewhat misleading and goes further than the court actually decided. All that was proved in that case was that the surety went to the bank and asked the cashier if the note was paid; that the cashier said it was not, but that another bank had a mortgage on all the principal

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debtor's land, was carrying him, and that his bank would not look to the surety any longer for payment; that in consequence of these statements the surety thought no more of the matter and was surprised when sued on the note. The court ruled: "There was nothing in this statement from which the witness had a right to assume that the note had been paid, or otherwise secured; on the contrary the very reverse was stated in plain words, and the information in regard to what had been done in the bank at Chillicothe did not give any assurances that this note had been provided for in the mortgage taken by that bank. Assuming, however, that the cashier's assurance was, that the debt was otherwise secured and that the defendant would not be troubled; that was, as the court of New Hampshire declares in Cocheco Bank v. Haskell, 51 N. H. 116, (a case cited and relied on by both parties), a mere agreement to discharge the surety, and not within the ordinary scope of a cashier's authority. . . . There is no dispute in this case in regard to the general principles of estoppel. They are recognized by this court in Driskell v. Mateer, 31 Mo. 325. The only question for this court to decide is, how far declarations and statements by an officer of a bank, called a cashier, binds the bank, in a case where there is no evidence of special authority." Turning to the case of Cocheco Bank v. Haskell, 51 N. H. 116, 12 Am. Rep. 67, cited by the Supreme Court as the basis of its decision, we find that the court distinguishes between mere promises and statements of the bank's cashier that it would release a surety or no longer look to him for payment as being a void contract and statements and representations of fact made by such cashier which induces another who had a right to rely thereon to do or omit doing something to his injury; that is, between contract and estoppel. The court there said: "In view of these principles and authorities, we think the cashier of a bank has ordinarily no power to discharge a debtor of the bank without payment, or to bind the bank by an agreement that a surety should not be called upon to

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pay a note he had signed, or that he would have no further trouble from it. . . . . It would be otherwise, we think, as to his declaration that the note was paid. It is his duty to receive payment and to keep the account of it, and he is the proper person to apply to, to ascertain whether a note has been paid or not. It would, indeed, be peculiarly within the scope of the business confided to him to give such information. If, then, on being inquired of by a surety, he had informed him that the note was paid, intending that he should rely upon the statement, and the surety was thereby induced to change his position, the bank would be *estopped* to deny that the note was paid."

If the case of Daviess Co. Sav. Assoc. v. Sailer, supra, be construed to hold that a bank cannot be estopped by the representations of its cashier so as to discharge a surety then it is in conflict with the case of West v. Bryson, 99 Mo. 684, 13 S. W. 95. In that case the court held that an administrator whose business it was to collect debts due the estate, yet had authority to extend the time of payment of an obligation, and by so doing would discharge a surety. It being shown, however, that there was no agreement to extend payment for a valuable consideration or definite time such agreement was void. "There are, however," says the court, "other principles of law applicable to this case. If the creditor gives the surety to understand that he will look to the principal debtor, alone, for payment, and the surety is thereby lulled into security to his loss, the creditor should suffer the consequences. Thus it was held in Harris v. Brooks, 21 Pick. 195, that a parol declaration of the holder of the note to the surety, that he would exonerate him and look to the principal only, and the surety by reason thereof omitted to take up the note and secure himself, constituted a good defense for the surety. Though a promise to look to the principal alone for payment, standing by itself, would be a *nudum pactum;* still, as has been said, 'where, however, the surety is induced by such an assurance to surrender the securities which he has received from the

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principal, or to forego any means of indemnity or protection, an estoppel will arise to the extent of the resulting loss.' [2 Am. Lead. Cas. (5 Ed.), 481.] Here Bryson, the surety, was lulled into security by the assurance of Brooks, for a period extending from 1874 or 1876 to 1885, and in the meantime the principal debtors and all of the other sureties became insolvent. The principal debtors had furnished security by the deed of trust, executed in 1876, sufficient to satisfy the balance due upon the judgment; but this security became depreciated by the *laches* of Brooks. It would be nothing short of giving effect to a fraud to require the Bryson estate to pay any part of the judgment under those circumstances." This is a clear holding that a promise or representation that the creditor would not look to the surety for payment, while void as a contract, may nevertheless be the basis of an estoppel when acted on by the surety to his loss. We must hold, therefore, that the court erred in rejecting the offered evidence.

The bank had a perfect right to take security from Lee for any particular note or notes. It seems that it had done so before the sureties took action looking to securing themselves. Whether such sureties or comakers could or would at that time have been able to secure themselves and to what extent is a question for the jury. In no event are the sureties to be relieved beyond the extent to which they were damaged by being caused to refrain from taking security such as they could get from the principal debtor.

There is some evidence also to the effect that the bank failed to enforce its mortgage against all of Lee's property covered by it and apply the proceeds to Lee's debts. This, of course, the bank was obligated to do and its failure so to do would release the sureties to the extent of their loss. [Lakeman v. North Missouri Trust Co., 147 Mo. App. 48, 126 S. W. 547; Troll v. Real Estate Co., 186 Mo. App. 196, 171 S. W. 665.] This phase of the case was not fully developed

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and the evidence is not satisfactory. We merely allude to it in view of another trial.

The case is reversed and remanded, to be retried in accordance with this opinion and the opinions in the two former cases of like nature. *Cox, P. J.*, and *Farrington, J.*, concur.

E. U. SINGLETON, Respondent, v. H. C. SHEPHERD, Appellant.

Kansas City Court of Appeals, February 7, 1917.

1. **PRINCIPAL AND SURETY: Release of One: Contribution.** There were two sureties on the bond of an insolvent principal. A judgment was rendered on the bond against all three for $2321. Afterwards one of the sureties settled his part of the obligation with the creditor for $500 and received a release which provided that his co-surety should not be discharged. About seven years afterwards this co-surety settled with the creditor for $1500, which including interest, was less than half the original demand. The latter surety then instituted an action against the former for contribution, on the ground that of the two payments to the creditor he had paid the greater part. It was *held* that having paid less than half of the original demand, he was not entitled to contribution.
2. **CONTRIBUTION: Sureties: Proportionate Part.** When there are several sureties each, as between themselves, owes his proportionate part, and one has no right to contribution from the others unless he has paid more than his proportionate part.
3. ———: ———: **Payment of Less Than Proportionate Part.** If one of several sureties settles the whole debt with the creditor though for a sum which is less than his proportionate part, so that no claim is left against the other sureties, he may have contribution from his co-sureties for their part of the sum he actually paid to the creditor in extinguishment of the debt against all of them.
4. ———: ———: ———: **Statutes.** The Statute on Sureties examined and authorities discussed.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

REVERSED.

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Erasmus C. Hall for appellant.

Numa F. Heitman for respondent.

ELLISON, P. J.—Plaintiff and defendant were co-sureties for one Robertson on his forthcoming bond in an attachment suit against him. Judgment was rendered in December, 1898, against all three for $2321.48, and it bore six per cent interest. Robertson was insolvent. Afterwards, in June, 1900, defendant paid the judgment plaintiff five hundred dollars for a release from the judgment "and from all liability therefor and obligation thereunder, without however releasing his co-obligors." About seven years afterwards this plaintiff, with knowledge of defendant's payment and release, paid the judgment plaintiff in the attachment suit fifteen hundred dollars " in satisfaction of the judgment." This payment, at that date, was *less* than the amount, with interest, due from plaintiff as his portion of the judgment.

Plaintiff's theory is that, including both his and defendants payments, the judgment was settled for two thousand dollars, of which he and defendant each owed one-half; and that since he paid five hundred dollars more, and defendant paid five hundred dollars less than one-half, the latter is liable to him in contribution.

Defendant's theory is that as between him and plaintiff, as co-sureties, each owed one-half of the judgment and that since the payment made by plaintiff was less than his portion of "the original demand," he had no right of action in contribution under the statute (Sec. 11277, R. S. 1909) which reads:

"When there are two or more sureties in any such bond, bill or note, and any of them shall pay, in money or property, more than his due portion of the original demand, such surety may recover such excess, as herein provided for a surety against the principal debtor."

Notwithstanding this statute reads that one surety can only recover of his co-surety what he has paid in excess of his portion of the "original demand," it is not meant that he may not have contribution if he compromises

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or settles the original demand for less than its face; for he has aided his co-surety by wiping out a debt they both owed. [Burrus v. Cook, 215 Mo. 496, 509; Stallworth v. Preslar, 34 Ala. 505; Sinclair v. Redington, 56 N. H. 146, 152.] In such instance it is not a prerequisite to a right for contribution, that the surety should have paid more than his portion "of the *original* demand." In practical effect, the sum paid in settlement, stands for, and in place of, the original demand.

So, notwithstanding plaintiff paid less than one-half of the judgment, if he had in fact thereby discharged, or settled, the whole of it, he could have held defendant in contribution for one-half of what he paid for the settlement. But he did not pay or discharge the judgment; he only discharged the balance of it remaining after defendant's payment, that is, that part of it which he, himself, owed; defendant having settled the other part long before.

Plaintiff places reliance on section 2777, Revised Statutes, 1909, which authorizes a creditor of two or more debtors, joint or several, to compound with either for such sum as he may see fit and release him "without impairing his right to demand and collect the balance of such indebtedness from the other debtors not so released: Provided that no such release shall impair the right of any debtor of such indebtedness, not so released, to have contribution from his co-debtors, as is by law now secured to him." That section does not aid plaintiff. In his situation there is no right of contribution "by law now secured to him." The section must be construed with section 11277, supra, which gives a right of contribution only to such surety who has paid "more than his due portion of the original demand."

The creditors act releasing defendant, released plaintiff also in so far as he was liable as a joint obligor for defendant's part, but left him still liable for his own part and when he settled that part, he did not pay "more than his due portion of the original demand;" he merely settled his own single obligation and paid nothing in "excess" of his own debt. He could not have been paying anything for defendant, since the latter had adjusted his part for

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himself, which left nothing outstanding but plaintiff's part, and he, of course, has no right to ask contribution for payment of that for which, as between him and defendant, he had become solely obliged. Sureties on a note may be used in illustration of what we have said: One of two sureties gives notice to the holder to sue; if the holder fails to sue he releases the surety who gave the notice and he also releases the other surety as to that half, but the creditor does not release him as to his own part and when he pays such part, there is no right in contribution. [Routon v. Lacy, 17 Mo. 399, 401; Dodd v. Winn, 27 Mo. 501.]

Plaintiff insists that the statute has been construed in his favor by the Supreme Court in Schneider v. Maney, 242 Mo. 36, 42. That case has no application to this. It involved the rights of the creditor as against the sureties, while this case involves the rights of sureties as between themselves. It is decided in that case that the creditor may release one of two (or more) sureties and then sue the remaining surety and recover the entire balance of the debt. The statute also preserves the right for contribution to the party sued against the party released, but it does not enlarge that right, and since the right does not come into existence until the surety pays more than his portion (Sec. 11277, supra) which plaintiff has not done, it follows he has no right. The statute is first found in the revision of 1855 and State ex rel. v. Matson, 44 Mo. 305, was decided in 1869, and it is there held that the release of one surety will partly release the other, that is to say, to the extent of whatever the released surety would have been liable to him for in contribution. It being said in that case that "The discharge of one surety cannot be permitted to increase the liability of the others." [Citing Routon v. Lacy, and Dodd v. Winn, supra.] But the first of the latter cases was decided prior to the enactment of the statute and the other, though decided after the statute, is based on facts transpiring before. Whichever may be the correct view, Schneider v. Maney, supra, is the latest ruling of the Supreme Court on the question; but, as

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stated, it is without application to the character of case before us.

The judgment is reversed. All concur.

ON MOTION FOR REHEARING.

ELLISON, P. J.—Plaintiff's motion for a rehearing is but a re-statement of what he urged in his briefs and at the argument. It is without merit. He insists that we have overlooked the following authorities cited by him which he states directly control this case, viz; Stallworth v. Breslar, 34 Ala. 505; Werborn v. Kahn, 93 Ala. 201, and Boutin v. Etsell, 110 Wis. 276. We did not over look them. We cited the first one in the foregoing opinion, and we do not understand why he should consider either of them as favoring his view. They determine, as we have, that if one of several co-sureties compomises or settles the debt with the creditor for himself and his co-sureties, even though he pays a sum less than would have been his own share of the whole debt as between them, he may demand contribution from them. In each of those cases the plaintiff discharged the entire liability against himself and his co-sureties. In this case, plaintiff settled his own portion of liability but did not settle any of defendant's for the simple reason that defendant had done that for himself.

Each of two sureties owes the entire debt to the creditor and if he releases one he releases the other for one-half the debt; but, as between themselves, each owes one-half the debt and if one settles his half at a discount, we do not see why the other should ask him to come in and help settle the other half.

To the authorities cited in the foregoing opinion we add the following; Morgan v. Smith, 70 N. Y. 537, 541; Benedict v. Rea, 35 Hun (N. Y.) 34; Gross v. Davis, 87 Tenn. 226; Durbin v. Kuney, 19 Oregon, 71; Gordon v. Moore, 44 Arkansas, 349; Pegram v. Riley, 88 Ala. 399, 403; Fletcher v. Grover, 11 N. H. 368; Smith v. State, 46 Maryland, 617, 619; Ex parte Gifford, 6 Vesy 805; Davies v. Humphries, 6 M. & W. 153, 168; Ex parte Snowden

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(1881), 17 Ch. Div. 44, 47; Cowell v. Edwards, 2 Bos. & P. 268; Browne v. Lee, 6 Barnes & Cress 689.

The text-writers seem all to agree on the question; Stearns Suretyship, p. 170, sec. 114; p. 522, sec. 286; p. 534, sec. 293; Burge on Suretyship, p. 386 (bottom); Smiths Principles of Eq., p. 329; 2 Parson on Notes & Bills, p. 253; 4 Pomeroy Eq. Jur., sec. 1418; 2 Beach Eq. Jur., sec. 822; 1 Brandt on Suretyship, secs. 279, 313.

MARTHA E. HUTCHINSON, Respondent, v. NATIONAL LIFE INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, April 30, 1917.

1. **LIFE INSURANCE POLICY: Date: Delivery.** A policy of life insurance providing for payment of annual premiums in advance was dated one day and delivered on another. It was held that the date of delivery and the corresponding date each year were the dates upon which the premiums were to be paid.

2. **———: Premiums: Thirty Days' Grace: Forfeiture.** A life insurance policy provided that if any premium be not paid when due the policy should remain in force for thirty days, but if not paid by the expiration of that time should be void. It was *held* that where the premium was not paid during the currency of the thirty days, it should be counted as due as if there had been no thirty day provision.

3. **———: ———: Days of Grace: Extended Insurance: Time.** Where a premium on life insurance is not paid within the days of grace allowed for its payment after default, the days of grace period should be counted in computing extended insurance.

4. **———: Net Value: Reserve: Statute: Dividends.** The "net value" of a life insurance, as contemplated by section 6946, Revised Statutes 1909, is the reserve, and a dividend which has been declared but not paid does not become a part of the net value.

5. **———: Dividend: Premium: Additional Insurance.** Where a life insurance policy provided that a dividend declared and not drawn by the insured, should be credited on the next annual premium to become due; or in the event that the assured paid the whole premium it should be applied to the purchase of additional in-

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surance and the assured failed to pay the premium; it was *held* that the dividend would be applied automatically as a credit on the premium and would not become a part of the net value of the policy, nor would it be applied to the purchase of extended insurance.

6. ———: **Extended Insurance: Dividends: Quarterly Premiums.** Where a life policy of insurance provides that the premium may be paid annually, semi-annually, or quarterly, it was *held* that the company could not be compelled to apply a dividend to the partial payment of a quarter and thus extend the insurance.

Appeal from Adair Circuit Court.—*Hon. C. D. Stewart*, Judge.

REVERSED.

Campbell & Ellison and *Locke & Locke* for appellant.

Higbee & Mills for respondent.

ELLISON, P. J.—Plaintiff's action is to recover upon a policy of life insurance for $5000 issued upon the life of her deceased husband by the Des Moines Life Insurance Company and assumed by defendant in its reinsurance of that company's business. The policy is dated the 2nd day of May, 1907, for a premium of $84.75 payable in advance on the 2nd day of May of each year during the term of insurance. The policy provided for thirty days' grace for payment of premiums. The insured died on the 3rd of October, 1914, without having paid the premium due the preceding May, and the defense is based on that default.

Plaintiff concedes the default, but claims the policy remained in force beyond the date of the death by reason of extended insurance based on the "net value" of the policy, under the provisions of section 6946, Revised Statutes, 1909; and she insists that this net value is aided by a dividend of $19.12 due deceased; and that the period of extended insurance is added to by the provision for thirty days of grace for the payment of premiums after they become due; and, by the fact that the policy was not delivered until May 22nd, whereby premiums were not

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due until the 22nd of May each year. That is to say, it is plaintiff's claim that in determining the purchasing power of the "net value" of the policy, the amount of the dividend should be added to it; and that in determining the time from which the period of extended insurance should begin to run, the time of the delivery of the policy and not its date, should be considered; and that the thirty days' grace should be allowed.

The trial court adopted plaintiff's view and rendered judgment for her.

The statute referred to reads as follows: "The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the actuaries' or combined experience table of mortality, with four per cent interest per annum, and after deducting from three-fourths of such net value, any notes given on account of past premium payments on said policy issued to the insured, and any evidence of indebtedness to the company, which notes and indebtedness shall be then cancelled, the balance shall be taken as a net single premium for temporary insurance for the full amount written in the policy."

From May 2nd, the date on the face of the policy, until deceased's death on the 3rd of October (counting by the day) is a period of one hundred and fifty-four days. The statute above quoted is that the net value of the policy at the time the premium becomes due is to be ascertained with four per cent interest, and that three-fourths of such value (after deducting indebtedness) is considered a single premium extending the life of the policy for the same proportion of a year that such three-fourths net value bears to an annual premium. That is to say, if the three-fourths net value at the time of default is $50 and the annual premium defaulted is $100 the life of the policy would be extended for six months.

It is admitted by defendant that a single net premium on a policy of $5000 at deceased's age of forty-six years at his death, was sixteen and ninety-one hundredths cents per day and that the net value of the policy was $23.50, and that three-fourths of this would purchase, at the rate

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of a single net premium, one hundred and thirteen days extended insurance. It is, however, claimed by plaintiff that according to the testimony of witnesses, testifying as experts for defendant, based on the character of policy this is, it would purchase one hundred and seventeen days and we will assume this to be correct. But, counting from the date of the policy, that lacks thirty-seven days of reaching to the death of deceased; and counting from the date of delivery of the policy (say May 22nd) and not the date on its face (Halsey v. Ins. Co., 258 Mo. 659) it would still lack sixteen days. Therefore, in order to save her case, plaintiff must maintain a right to thirty days' of grace after May 22, or that the dividend of $19.12 should be counted as a part of the "net value" of the policy. If she can sustain either one of these positions, within the terms of the policy as they are pleaded in the petition, it will carry extended insurance beyond the date of deceased's death, as the dividend is a sum sufficient to purchase insurance far beyond that time.

The provision of the policy as to days of grace is as follows: "If any premium be not paid when due, this policy shall be extended and remain in force for thirty days from such date, and if not then paid with the additional payment of ten cents per thousand dollars of insurance, this policy shall be absolutely void, and all premiums paid shall be forfeited to the Company." In our opinion this did not affect the default; for the assured did not pay within the thirty day period. He did not embrace the terms of the provision. If he had, it would have related back to the default and prevented the forfeiture. But, obviously, by no fair interpretation of the provision, can it be said that the policy was to run an extra thirty days without charge if, as here, the defaulted payment was not made. Deceased had all of the thirty days after the default in which to pay, and if he had died between the default and the expiration of that time the premium, under another provision of the policy, would have been deducted from the amount of the insurance. But if he had the full

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time and threw away his days of grace, and died in default, under no circumstances could his beneficiary get aid from that provision. We do not see that Martin v. Ins. Co., 190 Mo. App. 703, cited by plaintiff, has any application, since in that case the premium was paid.

This brings us to the final claim that the dividend should be considered as a part of the net value of the policy. The "net value" at a given time was shown at the trial to be the "reserve." This is conceded and it is the view adopted by the authorities. [Liebing v. Ins. Co., 191 S. W. (S. C.) 250, 254; Rose v. Ins. Co., 153 Mo. App. 90; Fahle v. Ins. Co., 155 Mo. App. 15.] The statute enacts the process whereby the net value is ascertained and does not include an unpaid dividend. On the other hand, the contract in the policy is that the unpaid dividend is to be applied in part payment of the next annual premium.

Running through the argument for plaintiff there is to be found a confusion of statement as to the application of the dividend of $19.12, declared by defendant on the 31st of December, 1913. First is the insistence that it should be applied to the payment of the premium, then follows an assumption that the dividend, thus applied, bought extended insurance. We think that does not follow. The two things are wholly disconnected and distinct matters. A sum which is to be used in payment of premiums becomes a part of the premium fund and pays, or helps to pay, the premium which buys the regular insurance and furnishes no part of the fund which purchases extended insurance, except as it may do so indirectly by a part of it becoming a part of the reserve. The fund which buys the latter insurance is provided by law and is ascertained after the manner pointed out in the statute; while the former is provided for by the contract, and contemplates a continued live contract. The latter is attached by law to prolong the life of a contract which, if left to its own terms, would be ended by forfeiture. Plaintiff truly says, at page 10 of the brief in her behalf, that "the policy provided that the dividend of $19.12 should be applied as a credit on the premium." But it is immediately added, that this, at the rate per day, "carried the insurance 118

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days," a period long beyond the date of deceased's death. The policy does provide that "dividends assigned by the company shall be applied to the reduction of each subsequent year'spremium, or if the insured prefer to pay any premium or premiums in full, the dividend or dividends will be applied to the purchase of paid-up additions to the policy." But as deceased did not pay his premium due in May, 1914, this dividend of $19.12 declared the previous December, was automatically credited on that premium, reducing it from $85.75 to $66.63, but still leaving the default. The fact that it was for a less amount does not destroy its force as a forfeiture.

Plaintiff seeks to deal with this dividend as a separate and distinct payment of a premium for the purchase of extended insurance, carrying the life of the policy beyond the death of the insured. This would not be within the law and would be outside the terms of the contract. For, as we have seen, it must be merely credited on the annual premium falling due next after the dividend is declared.

But there is a provision in the policy that premiums may be paid annually, semi-annually, or quarterly, and it may be suggested that the dividend would apply as for as it would go as a quarterly payment. But the same answer could be made to this as has just been made to a full annual payment. The dividend was not sufficient to cover a quarterly payment, and if, without request from the assured, defendant had credited it as a quarterly payment, it would still have left a default. If a quarterly payment was intended to be made, it, of course, should have been for a full quarter. The defendant could not be required to accept less. [Terry v. Ins. Co., 90 S. C. 1.]

The fact that the lawmakers in legislating on the subject of extended insurance have failed to provide in terms that upon default in payment of premiums when there were dividends declared, but not paid or applied, the amount of such dividends should be used in the purchase of extended insurance, is apparently conclusive it was not intended that they should be used for that purpose. The contract provides for only two uses of unpaid divi-

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dends, one as a credit on the next annual premium, and the other to purchase of additional insurance if the insured paid the annual premium in full; and we have seen that as the insured did not pay the premium, the dividend could only be applied as a credit thereon.

It is apparent from plaintiff's petition that the theory that the dividend was to be considered as an addition to the net value of the policy was not entertained when that pleading was drawn; for it is therein alleged that "dividends assigned by the company shall be applied to the reduction of each subsequent year's premium." And that when the defaulted "premium matured and became due (the assured was) entitled to a dividend of $19.12 to be applied as a credit on said premium."

There is a somewhat vague claim made by plaintiff that there was a large surplus due the policy holders and that she should in some way receive such benefit from it as either to discharge the premium defaulted, or at least carry the insurance beyond the assured's death. Nothing of that nature was pleaded.

From the foregoing considerations it follows that the judgment is without legal support and it is therefore reversed. All concur.

TERMINAL ICE & POWER CO., Appellant, v. COMMERCIAL FIRE INS. CO., Respondent.

Kansas City Court of Appeals, April 30, 1917.

FIRE INSURANCE: Notice of Foreclosure of Deed of Trust. The provision of a fire insurance policy that the policy shall become void "if with the knowledge of the insured foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy by virtue of any mortgage, or deed of trust," does not apply where notice of foreclosure was published before the issuance of the policy.

Appeal from Jackson Circuit Court.—*Hon. Allen C. Southern,* Judge.

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REVERSED AND REMANDED.

Lathrop, Morrow, Fox & Moore, and *Boyle & Howell* for appellant.

Fyke & Snider for respondent.

BLAND, J.—This is a companion case to Terminal Ice and Power Company v. American Fire Insurance Company, decided at this term. However, the policy of insurance involved in this case was issued on June 13, 1913, about six days after the notice of foreclosure had been published. The provision of the policy "if with the knowledge of the insured foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy by virtue of any mortgage, or trust deed" the policy shall become void is not applicable to this case, for the reason that that clause could not apply to any conditions which existed at the time of the issuance of the policy and the policy became void only for breaches occurring after the policy was issued. [Orient Insurance Company v. Burrus, 63 S. W. 453 (Ky.); Cooledge v. Insurance Co., 30 Atl. 798 (Vt.).]

The judgment in this case is, therefore, reversed and the cause remanded.

All concur.

ON REHEARING.

BLAND, J.—The parties to this suit have joined in a request to the court to modify the opinion herein for the reason that the suit was brought on two policies of insurance; one of said policies being dated June 13, 1913, for the sum of one thousand ($1000) dollars, and the other being dated May 19, 1913, for the sum of fifteen hundred ($1500) dollars. The latter policy was issued before foreclosure proceedings were commenced and therefore is subject to the rule laid down by this court in the case of Terminal Ice & Power Company v. American Fire Insurance Company, 194 S. W. 722.

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In writing the original opinion in this case the court, by the briefs filed in this case, was erroneously led into the idea that this suit was upon one fire insurance policy issued June 13, 1913.

In accordance with the request of the parties hereto it is ordered that the judgment of the lower court covering the first count of plaintiff's petition be reversed and remanded. The judgment of the lower court in reference to the second count of plaintiff's petition is affirmed.

MUNICIPAL SECURITIES CORPORATION Respondent, v. METROPOLITAN STREET RY. CO. et al.

Kansas City Court of Appeals, April 30, 1917.

1. **TAXBILLS: Street Railways: Street Pavement: Abutting Property.** The property of a street railway company on which is located car barns and shops and connected with the tracks on the street by numerous switch tracks, is liable for its proportion of the entire cost of paving the street on which said property abuts, notwithstanding no paving was done on that part of the street where the switch tracks were laid to connect the railway in the street with the car barn and shop, the street railway having paved that part under the requirements of its franchise, the opposite side of the street, however, being paved under a public improvement ordinance covering several blocks and for the payment of which tax bills sued upon herein were issued.

2. ———: **Franchise: Street Paving.** Where a street railway has, under the requirements of its franchise, paved a street in front of premises owned by it, abutting on said street, it is not relieved of liability for its share of the cost of paving the entire street, notwithstanding the contractor to whom the tax bills were issued did no paving in front of the property of the street railway except on the opposite side of said street.

3. ———: **Charter of Kansas City.** The Charter of Kansas City does not recognize any longitudinal line dividing a street and making the property on one side of the street bear the burden of paving up to such a line, and the property on the other side bear a like burden upon its side. All property is benefited alike in an improved district and all should bear proportionately the cost of the improvement.

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4. ———: **Abutting Property: Proportionate Cost.** Because the amount of paving done in front of some of the property abutting on a street is less than in front of other property does not relieve it of the burden of its proportionate amount of the cost of the entire work.

Appeal from Jackson Circuit Court.—*Hon. O. A. Lucas,* Judge.

AFFIRMED.

Clyde Taylor and *Louis Weiss* for appellants.

W. R. James and *Clarence S. Palmer* for respondent.

BLAND, J.—This is a suit upon a paving tax bill issued against defendants' land. The case was tried upon an agreed statement of facts, the material part being as follows:

"It is agreed that upon the land so owned by the defendants, at the time said pavement was laid, and prior thereto and ever since said time, defendants maintained a car barn, a shop, etc., and that said defendants owned and operated on Southwest Boulevard a double track street railway, and maintained switches connecting their said property with the tracks in the street; that by the terms of the franchise ordinance from Kansas City, which was long prior to the special ordinance authorizing the improvement for which the tax bill in question was issued, it was the duty of the defendants to pave the spaces between the rails of its said switch tracks and for a space of eighteen inches outside the tracks, and to maintain such pavement, and that the defendants did construct and maintain such pavement; that Ordinance No. 6255, authorizing the paving of Southwest Boulevard, for which the tax bill in question was issued in part payment, specifically excepted the spaces required to be paved and maintained by defendants under its franchise ordinance, and the contractor who did the work for which said tax bill was issued was not required by his contract to do, and he did not do any work upon the spaces so required

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to be maintained by the defendants, and such yardage was not included in the total yardage laid by said contractor, but on the side of Southwest Boulevard opposite the said land of the defendants, did construct paving between the curb and a line distant eighteen inches from the Northwest rail of the tracks of defendant in said street. It is also agreed that the contractor did construct paving on the side of Southwest Boulevard on which defendants' property is located, and abutting defendants' property, between the curb and a line eighteen inches distant from the Southeast rail of the tracks of defendants in said street, for a distance of 103 lineal feet; that defendants' property had a frontage of 257.7 feet upon Southwest Boulevard, and that all of said frontage abuts on paving laid and maintained by defendants, save and except the 103 feet frontage mentioned above;"

Defendants maintained a number of switch tracks leading into said car barn and shop and in compliance with the requirements of its franchise paved between these tracks and eighteen inches on both sides thereof, and as a result thereof 154.7 feet of defendants' total frontage of 257.7 feet was entirely paved, leaving 103 feet in front of defendants' property that was not paved by defendants, but by the paving contractor. It is to be borne in mind that the defendants did no paving whatever except that which was required by their franchise. Under these facts defendants claim that said 154.7 feet of their property in front of which they had already paved, is not liable for this improvement.

Defendants base this argument upon the claim that the city required them to do the paving that was done by them, and, therefore, that part of their property fronting on the part of the street paved by them should be exempt from any assessment for the cost of this improvement, and a number of cases are cited by defendants tending to support this contention. However, the trouble with this contention is that the city in a general sense did not require defendants to do the paving done by them but such paving was done by reason of the requirement of defendants' franchise fixing the burden on them to pave

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between their tracks and eighteen inches on each side thereof. This agreement to do this paving was a part of the consideration given by defendants to the city in obtaining their franchise through which they secured the privilege of operating their cars on the streets of the city. The paving that was done by defendants was therefore paid for by the city in defendants' franchise and defendants are no more entitled to the benefit of this improvement made by them than if the city itself had done the paving with its own funds.

Defendants' contention that the agreed statement of facts does not show that it was a part of the *consideration* of the franchise that defendants pave within their tracks and eighteen inches on each side thereof is not well taken, for, although the agreed statement of facts does not use the word "consideration," it states that this paving was done under the requirements of the franchise. It is too plain for argument that any requirements made of defendants in the franchise were a part of the consideration for the same.

However, defendants say that as there was no paving done in front of this 154.7 feet owned by defendants that said property could not be assessed for the improvement, and cites in support thereof Smith v. Small, 50 Mo. App. 401; Halpin v. Campbell, 71 Mo. 493. In the former case the court disallowed the tax bill against defendant's land for the reason that the street in front of his property was not included within the proceedings to pave the street, and in the latter case the city attempted to include within the impovement ordinance a large section of the street that had already been improved and paid for by the abutting property owners under requirements made by the city; for this reason the court held that it would be inequitable to make these property owners stand the burden of paying for the improvement on other portions of the street when they had already paid for the improvement in front of their property. Neither one of these cases is an authority on the case at bar, for in this case the proceedings provide for the improvement of the street starting with the State line and running several blocks north-

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eastwardly along and in front of defendant's entire property and several blocks beyond the same, and the latter case, of course, is not in point, for the reason that defendants, as we have already stated, cannot belikened to an ordinary property owner, paying for the paving in front of his property.

The Charter of Kansas City provides that the city shall "charge each lot or parcel of land with its proper share of such cost according to the frontage of such land on the street, avenue, alley or highway, or part thereof, named in the contract for the doing of the work." [Section 3, Art. 8, p. 314.]

Under provisions like these it has been often held in this state that the cost of the entire improvement is to be apportioned to each lot in accordance with its front feet, regardless of what the work may actually cost in front of any particular lot, and it is therefore said that an owner will not be permitted to free his lot by voluntarily grading and paving in front thereof. [Smith v. Small supra, l. c. 404.]

All the property is benefited alike in an improved district and the theory is that all should bear proportionately the cost of the improvement (Smith v. Small, supra; Heman Construction Co. v. McManus, 102 Mo. App. 649; Neenan v. Smith, 50 Mo. 525; City of St. Louis, to use McGrath, v. Clemens, 49 Mo. 552), and it is held in Gibson v. Kayser, 16 Mo. App. l. c. 407, that although no improvement is done in front of defendant's lot which is included in the improvement proceedings covering a number of blocks of property in one of which defendant's lot fronts upon the street improved, that the fact that no work is done in front of defendant's particular lot but that all the work is done in front of the lots of other owners fronting on the improvement, does not relieve defendant's lot from bearing its proportionate burden of the cost of the improvement.

Aside from this, the contractors actually did paving work in front of this 154.7 feet of defendants' property, in that the space between the car tracks and the curbing on the northwest side of the street, or the opposite side

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of the street from defendants' property, was paved. It is apparent from reading the cases referred to herein that the Charter of Kansas City does not recognize any longitudinal line dividing the street and making the property on one side of the street bear the burden of paving up to such a line, and the property on the other side bear a like burden upon its side. Therefore, although the space paved was on the opposite side of the street, it was in front of defendants' property. It has often been held that the fact that the amount of paving in front of defendant's property is less than that in front of other property abutting on the street does not relieve the defendant whose land abuts upon the space where the amount of pavement is the smallest of the burden of paying his proportionate amount of the cost of the entire work. [Paving Co. v. Munn, 185 Mo. 552; Dunker v. Stiefel, 57 Mo. App. 379.]

From what we have said defendants' entire property is liable for its proportion of the entire cost of the work done in this proceeding.

The judgment will, therefore, be affirmed. All concur.

A. J. SIMPSON, Respondent, v. LEON SMITH, et al., Appellants.

Kansas City Court of Appeals, May 21, 1917.

1. **CREDITORS BILL: Equity: Judgments: Subrogation.** Plaintiff obtained a judgment against defendant Lee Smith, and an execution issued thereon was returned *nulla bona*. Thereupon plaintiff brought a creditor's bill seeking to subject land owned by defendants as tenants in common to the payment of the judgment, a past due note secured by a deed of trust on said land having been paid by said Lee Smith. *Held*, that plaintiff had a right to go into a court of equity to reach the interest of Lee Smith in the land and to have the latter's lien thereon subjected to the payment of plaintiff's judgment.

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2. ———: ———: **Payment by One Debtor: Burden of Proof.** When a debtor is compelled to pay in excess of his due proportion of a debt, there is an implied obligation, *ex contractu* that his co-debtors will pay their proportionate amount and the burden is upon the co-debtors to prove that they have discharged this obligation.

3. ———: **Adequate Remedy at Law.** The right of a judgment creditor to reach the lien of the judgment debtor on the interest in land of his co-tenants created by reason of said judgment debtor having paid more than his share of a note secured by a deed of trust on said land, is a substantial and valuable one and one that could not be established by a court of law, and the fact that the judgment creditor might have run garnishments against said co-tenants does not give him a complete and adequate remedy at law, for the reason that, while their rights in the land might be reached under judgments against them as garnishees, the rights of the judgment creditor would be subjected to any prior liens and all exemptions.

Appeal from Livingston Circuit Court.—*Hon. Arch B. Davis,* Judge.

AFFIRMED.

Paul D. Kitt for appellant.

S. L. Sheetz for respondent.

BLAND, J.—The respondent having recovered a judgment in the Justice Court against appellant Lee Smith, filed a transcript thereof in the office of the circuit clerk of Livingston County and had execution issued thereon directed to the sheriff of said county. On the 4th day of January, 1915, the sheriff made a return *nulla bona* upon the execution.

Thereupon respondent brought this creditor's bill seeking to subject the land owned by the appellants to the payment of this judgment owed by defendant Lee Smith and alleged in his petition the facts as above stated; and, in addition, that defendant Lee Smith was insolvent; that said defendant was indebted to him by reason of said judgment, and alleging that the defendants were tenants in common of certain land situated in

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Livingston county, Missouri; that on July 10, 1914, there was a deed of trust securing the sum of one thousand ($1,000) dollars and interest thereon; that defendant, Lee Smith, shortly thereafter had used nine hundred ($900) dollars of his own individual money to take up said note, and sought to have plaintiff's judgment declared a lien on the land, on the theory that defendants, Lee Smith's mother and sisters, were required under the doctrine of contribution to pay their proportionate share to the defendant, Lee Smith, by reason of his having taken up a joint obligation of all the tenants in common, and in clearing the porperty of the deed of trust discharged an encumbrance for the benefit of all such tenants in common.

The evidence tended to prove the facts alleged and in addition that about July 11, 1914, defendant, Lee Smith, obtained a settlement of an action he had pending against the Milwaukee Railroad and received in such settlement the sum of one thousand ($1,000) dollars and that the nine hundred ($900) dollars that he used toward discharging the deed of trust against the land was a part of this one thousand ($1,000) dollars. The evidence further shows that in order to make up the balance to take up the deed of trust the parties executed a deed of trust in the sum of two hundred and fifty ($250) dollars on the property and that for a purpose not shown the defendant, Lee Smith, further mortgaged his undivided interest in the property for the sum of two hundred and fifty ($250) dollars.

The effect of the judgment of the court below was that a judgment against the defendant, Lee Smith, in the sum of three hundred, twenty-four and 55/100 ($324.55) dollars was rendered and the land subjected to a lien in favor of plaintiff to the amount of said judgment as against the interest of defendant, Lee Smith, and as against the other defendants by ordering that their shares in the land be subjected to a lien under the judgment in proportions to the amount of money paid out for them by defendant, Lee Smith, on the note and deed of trust aforesaid; and that defendants be required to pay

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on plaintiff's judgment sums of money in the proportions that the said nine hundred ($900) dollars was paid out for their benefit.

The first point raised by appellants is that plaintiff had a complete remedy at law. Appellants assign many reasons why they claim this statement to be true. The first being that the evidence does not show that the other defendants owed defendant, Lee Smith, any amount; that when Lee Smith paid $900 of his own money to discharge the mortgage on the property there is no evidence that he was not indebted to the other defendants, and in paying this amount he discharged such indebtedness, or, granting that Lee Smith was not so indebted at that time to the other defendants, there is no evidence that the other defendants have not repaid the indebtedness created by him in favor of Lee Smith by reason of having paid out of his own money $900 on said mortgage.

The evidence shows that the note secured by deed of trust was due and unpaid and the holder thereof was threatening to foreclose. The law is that when a debtor has been compelled to pay in excess of his due proportion of the debt there is an implied obligation *ex contractu* that his co-debtors will pay their proportionate amount (9 Cyc. 794; Van Petten v. Richardson, 68 Mo. 379; Lebeaume v. Sweeney, 17 Mo. 153; Hanna v. Hyatt, 67 Mo. App. 308), and as the law presumes that when such a debt is so paid the obligation is discharged for the benefit of all, the burden is upon the other defendants in this case to prove that they have paid or discharged their debt to defendant, Lee Smith. [Ryans v. Hospes, 167 Mo. 342; Ferguson & Wheeler v. Dalton, 158 Mo. 323.]

The next point raised by appellants is that there is no showing that the defendant, Lee Smith, was insolvent at the time of the filing of the creditor's bill. While Lee Smith testified that the only assets he had was his interest in this land, this is not conclusive but the showing of the *nulla bona* return of the sheriff was sufficient to sustain the bill. [Edwards & Son Brokerage Co. v.

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Rosenheim, 74 Mo. App. l. c. 625; 12 Cyc., 10 and 11; Humphreys v. Atlantic Milling Co., 98 Mo. l. c. 548.]

The next point raised by appellants is that the plaintiff could have garnished the debt owed by the other defendants to Lee Smith as under the holding of Van Petten v. Richardson, supra, Labeaume v. Sweeney, supra, and Hanna v. Hyatt, supra, defendant, Lee Smith, having paid off the joint note of all of the defendants, was entitled to contribution from the other defendants and that this right could have been enforced in an action at law, and, therefore, as the other defendants were indebted to defendant, Lee Smith, such garnishment would have been a complete and adequate remedy at law.

While it is true that plaintiff could have proceeded at law in the manner pointed out by appellants, he would not have had an adequate and complete remedy by so doing. When the defendant, Lee Smith, took up the note secured by the deed of trust and by so doing paid on it more than his proportionate share of the debt he was subrogated to the rights of the mortgagee in the note and deed of trust to the extent his money went toward taking it up (Burrus v. Cook, 215 Mo. 496; 37 Cyc. 443) and consequently the defendant, Lee Smith, had a lien on the land to the extent of the amount he paid over and above his share of the indebtedness, and his co-tenants are bound in equity to contribute their respective proportions of the money paid on the encumbrance in that their interest in the land is charged with their proportions of the money so paid. [Mahoney v. Nevins, 190 Mo. 360; Aubuchon v. Aubuchon, 133 Mo. l. c. 264.] The right of plaintiff to reach this lien of defendant, Lee Smith, on the land is a substantial and valuable one and it could not be established by a law court. It will not do to say that by running garnishments against the other defendants is this case judgments could be obtained against them for the amount due from them to defendant, Lee Smith, and that such proceedings would be adequate under the circumstances; for, although their rights in the land might be so reached, if they failed to pay the judgments rendered against them as garnishees, the

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rights of the judgment creditor under such judgments would be, in the nature of things, subjected to any prior liens and all exemptions. Thus plaintiff might be hampered in the collection of such judgments, and even should these hindrances be overcome by plaintiff, we could not say that he would even then be left with a remedy as adequate and complete as the court below gave him. Therefore, we believe that the remedy of a multiplicity of garnishment proceedings is not full, adequate and complete.

We believe that plaintiff clearly had the right to go into a court of equity for the purpose of reaching this peculiar interest of defendant, Lee Smith, in the land and to have said Lee Smith's lien on the land subjected to the payment of plaintiff's judgment.

The judgment is affirmed. All concur.

THE CUDAHY PACKING COMPANY, Appellant, v. CHICAGO & NORTHWESTERN RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, June 11, 1917.

1. **CARRIERS: Interstate Commerce Shipment: Bill of Lading: Necessity for.** Whether the issuance of a bill of lading to the shipper by an interstate carrier is necessary to an action under the Carmack amendment to the Interstate Commerce statute, *quaere*. A remedy under that statute has been allowed in several States when no bill was issued.

2. **———: Pleading: Bill of Lading: Proof: Presumption.** Where a shipper plaintiff alleged in his petition for damages against the initial carrier under an interstate shipment, that the carrier issued to him a bill of lading and that he was the legal holder thereof, and this is denied in defendant's answer, the shipper must prove it or fail in his action. And a presumption that since the statute requires the carrier to issue a bill, it did so, will not supply the place of such proof.

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3. **INTERSTATE CARRIER: Presumption: Pleading.** An interstate carrier is entitled to a presumption that its business is being carried on in a lawful way, but that presumption cannot be substituted for proof where the shipper alleges in his petition that a bill of lading was issued to him by the carrier.

4. **———: Evidence: Concealment: Presumption.** Where a plaintiff shipper has evidence of the fact, i. e., has possession of a bill of lading which he pleaded was issued and delivered to him by the carrier, he cannot hold back the bill of lading and rely on the presumption that the carrier complied with the statute directing bills of lading to be issued.

5. **———: ———: Possession: Presumption.** When a party plaintiff is in possession of evidence of the fact, he cannot refuse to produce it and invoke a presumption as a substitute for such fact.

Appeal from Jackson Circuit Court.—*Hon. Daniel E. Bird,* Judge.

AFFIRMED.

New, Miller, Camack & Winger for appellant.

Sebree, Conrad & Wendorff for respondent.

ELLISON, P. J.—Plaintiff is a meat packing establishment and defendant an interstate carrier. The former made two shipments of meat over defendant's road, as the initial carrier, from Sioux City, Iowa, one to New York and the other to Massachusetts. Each arrived at destination over connecting carriers, in a damaged condition and this action was instituted under the interstate commerce law, resulting in a verdict for plaintiff, which the court set aside and granted a new trial. Plaintiff appealed from that order.

The petition is in two counts, one for each shipment, and in each count it is alleged that defendant issued a bill of lading evidencing the contract of carriage and that plaintiff was the legal owner and holder of such bills. The reason for granting a new trial is stated, in the order, to be that there was no evidence that bills of lading were issued.

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Plaintiff concedes the fact to be as stated by the court, but insists that a bill of lading was not necessary to maintaining the cause of action alleged. That part of the Carmack amendment to the Interstate Act, applicable (sec. 20) reads as follows: "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided,* That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law." It must be conceded that the words used in this section are of a mandatory character, and defendant contends that they are emphasized by the language used in decisions of the Supreme Court of the United States, especially Adams Express Co. v. Croninger, 226 U. S. 491. At page 504 of the opinion in that case, it is said that one of the "dominating features of that amendment" is that "It affirmatively requires the initial carrier to issue 'a receipt or bill of lading' when it receives 'property for transportation from a point in one State to a point in another.'" At page 505 is found the expression that "It (the Carmack amendment) embraces the subject of the liability of the carrier under a bill of lading which he must issue and limits his power to exempt himself by rule, regulation or contract." At page 506, it is said, "The duty to issue a bill of lading and the liability thereby assumed are covered in full," etc. And at page 507, in speaking of the proviso clause of the section which continues existing remedies and rights of action, whether under State statutes or the common law, limits such remedies and rights, thus continued, to such as are not inconsistent

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with the provisions of the act. To this may be added the recent case of Pennsylvania R. R. Co. v. Olivit Bros., decided by that court April 30, 1917.

If verbal contracts for interstate shipments may be made and enforced under the interstate law, will not uniformity cease? And will not full room be left for discrimination and thus the principal feature of the statute be destroyed? If a shipper desires the remedy and the protection provided by that statute should he not demand a bill of lading?

However, it has been ruled by several State courts, in line with plaintiff's suggestion, that the issuance of a bill of lading is "a mere detail requirement," and is not necessary to interstate shipments and liability under the interstate law. [Aton Piano Company v. Railroad, 152 Wisconsin, 156; Gamble-Robinson Company v. Union Pacific Railroad Company, 262 Illinois 400, 405; International Watch Company v. Delaware, Lackawanna & W. Railroad Company, 80 New Jersey Law, 553, 556.]

But those cases are not like the one before us. Neither of them purports to have been instituted and based on a bill of lading, while in the present case, as we stated at the beginning, the action, as disclosed by the petition, is founded on a bill of lading issued and delivered to plaintiff.

We are not put to the necessity of deciding this question in this case, since plaintiff has chosen to found his action on the issuance of a bill of lading. Having stated that character of action, it is necessary to prove it. For a party cannot sue on one cause of action and recover upon another even though they relate to the same subject-matter. [Cole v. Armour, 154 Mo. 333, 351; Huston v. Tyler, 140 Mo. 252; Ingwerson v. Railroad, 205 Mo. 328, 335; Koons v. St. Louis Car Company, 203 Mo. 227, 254; Roaring Fork Potato Growers Ass'n v. Clemons Produce Company, 193 Mo. App. 653, 657, 658.]

But plaintiff seeks to avoid this fundamental rule by the claim that the action was not founded on the bill of lading. But manifestly it is. The petition states that for "the consideration of certain charges to be paid

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to defendant" it agreed to transport and deliver; and then sets up the bill of lading. [Meade v. Railroad, 183 Mo. App. 353; Laming Mfg. Co. v. Railroad, 182 S. W. 181.]

But plaintiff has endeavored to excuse itself from proof by invoking a presumption, i. e., that since the interstate statute directs that a bill of lading shall be issued by the initial carrier, it will be presumed that it did its duty and one was issued. The following cases on presumptions are cited in support of this. [Cinn. & Tex. Pac. Ry. Co. v. Rankin, 241 U. S. 319, 327; Bank of U. S. v. Dandridge, 12 Wheat, 64, 69-70; Knox Co. v. Ninth Nat. Bank, 147 U. S. 91, 97; Maricopa & Phoenix R. R. v. Arizona, 156 U. S. 347, 351; Sun Pub. Co. v. Moore, 183 U. S. 642, 649.]

We think those cases are not applicable. The first is the only one specially referred to. There defendant railroad pleaded it had duly filed its schedule of rates, etc., and the State trial court (p. 323) said that it had no doubt that where the railroad defendant charged with a violation of the Interstate Commerce Law a presumption in favor of its compliance would arise, but as the railroad pleaded its compliance as a matter of defense, no presumption would arise in its behalf and it should prove it. The Court of Civil Appeals of Tennessee (approved by the Supreme Court) in affirming the trial court said (p. 324) that: "It hardly appears debateable to us, that it was incumbent upon the railroad company, in this case, in the present state of the pleadings, to show by proof that it had met the requirements of the Interstate Commerce Act, and this burden it failed to carry, and having failed to do so it cannot rely upon presumption." In reference to this, the Supreme Court of the United States refused to consider whether the question was controlled by the pleadings, Mr. Justice McReynolds saying (p. 326): "The State courts, treating the bill of lading as properly in evidence, undertook to determine its validity and effect. We need not, therefore, consider the motted questions of pleading. The shipment being interstate, rights and liabilities of the parties depend

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upon acts of Congress, the bill of lading, and common-law rules as accepted and applied in Federal tribunals."

As stated in New York Central & Hudson R. R. Co. v. Beaham, 37 S. C. Rep. 43, an interstate carrier is entitled to a presumption that "its business is being carried on lawfully." But that, and like holdings, do not touch the question before us. Here the plaintiff has affirmatively alleged, as the matter upon which its cause of action is based, that a bill of lading was issued for the meat and delivered to it; and this was denied by the answer. In such circumstances it cannot substitute a presumption for proof.

There is another reason why plaintiff should not be allowed a presumption and that is, it had the proof in hand and had no necessity for invoking substitutionary matter. A presumption is not the best evidence, it may not be true as a matter of fact. It is but a substitute for lack of anything better. It should not be indulged when evidence of the matter presumed is at hand. [1 Greenleaf on Ev., sec. 82.] If a litigant tenders an affirmative issue as his cause of action and has the proof in his pocket, may he suppress it, remain silent and depend upon a presumption? The courts in this State have answered that in the negative. [Fifth Third Nat'l Bank v. McCrory, 191 Mo. App. 295, 297, 298; Mockowick v. Railroad, 196 Mo. 550, 571.] In the latter case the Supreme Court said that the plaintiff of all men, knew what the facts were, and, having declined to speak, he should not be allowed to invoke the aid of a friendly presumption. In Erhart v. Dietrich, 118 Mo. 418, 427, it is said that "Presumptions serve a most useful and indispensable part in the correct decision of many questions, but they are out of place, *when the facts are known or are admitted.*" (Italics not ours). And we may add to this; that when the facts are known to the party invoking the presumption and concealed by him, or he refuses to state them, he should not only not have the benefit of the presumption he invokes, but a presumption should come against him, that if he disclosed the facts they would be contrary to his claim. "It is certainly a maxim," said

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Lord MANSFIELD in Blatch v. Archer, 1 Cowp. 63, "that all evidence is to be weighed according to the proof, which it was in the power of one side to have produced, and in the power of the other to have contradicted." To the same effect is McDonough v. O'Neil, 113 Mass. 92, 96, and Lawson's Presumptive Evidence, sec. 153.

From these considerations it is our opinion that plaintiff should have proven issuance to it of bills of lading for the shipments and that the trial court did not err in granting a new trial, All concur.

GERTRUDE BILLINGSLEY, Respondent, v. KLINE CLOAK COMPANY, Appellant.

Kansas City Court of Appeals, June 11, 1917.

1. **FALSE IMPRISONMENT: Bogus Checks: Evidence.** A woman of mature years, with a knowledge of the world, met a strange man on a street corner in a city and permitted him to court her within twenty minutes. She shortly married him without inquiry as to where he lived or stayed. He was a drunken vagabond, without money and issued bogus checks which were cashed on her vouching for them. On the second day after the marriage she went with him to a retail store where she made large purchases of clothing, he paying for them in different bogus checks. She put on the clothing but before getting out of the store it was discovered the checks were fraudulent. The storekeeper had them both arrested and imprisoned for a day when she was discharged but he sent to the penitentiary. She brought suit for false imprisonment. It was *held* she did not make a case and a judgment in her behalf was reversed.

2. **———: Probable Cause: Allegation: Proof: Reasonabe Ground.** If a plaintiff unnecessarily allege that a false imprisonment was without probable cause he must prove it; and if it appears at the trial that a reasonable and cautious man, in the circumstances, would have believed him guilty, the plaintiff fails.

3. **HUSBAND AND WIFE: Crime: Presumption: Rebuttal of Presumption.** Though a wife is presumed to be so under the influence of her husband that she cannot commit a crime in his presence; yet

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this is a rebuttable presumption, and if the evidence shows that she took the lead and suggested and advised the criminal acts, the presumption is rebutted.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield,* Judge.

REVERSED.

Russell Field, R. E. Kalbert and *J. C. Rosenberger* for appellant.

T. A. Milton, J. K. Cubbison and *W. G. Holt* for respondent.

ELLISON, P. J.—Defendants are merchants in Kansas City dealing extensively in women's clothing, including hats and shoes, as well as articles of female adornment usually kept in large retail establishments. Plaintiff and her newly married husband, one "Doctor" Ekstrom, went into the store on the 23rd of December, 1914, when she purchased goods for herself amounting to the sum of $178, which she put on in one of defendant's dressing rooms. Her husband paid for these in checks which were ascertained to be fraudulent and "bogus" before they left the building and they were both arrested, taken to the police station and there lodged for the night and a part of the next day. She thereafter brought the present action for false arrest and imprisonment and obtained judgment for $2500. She alleged in her petition and tried her case on the theory that defendant had no probable cause. She so submitted it by instructions given in her behalf and insists here that she has successfully assumed that burden; and we will consider the case from that standpoint.

Ekstrom was a vagabond whom plaintiff says represented himself to be a wealthy dentist from Omaha. Plaintiff was thirty-four years old. She had been a clerk in a department store and later a professional nurse, at which business she was engaged when the present trouble had its inception. The record of her

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testimony shows that she is a woman of abundant mental capacity, though her many indiscreet actions show her to lack that reserve becoming to a woman of proper moral sensibility. Her examination, both by deposition and in court, shows that she knew the ways of the world and that she was well able to take care of herself up to the standard by which she chose to be measured. She had been married only once prior to meeting with Ekstrom though, for some reason, she told her first husband that he was her second. They were divorced. During the time she had been living in Kansas city, she visited grill rooms ad cabarets where she frequently drank liquor. She stated that she never drank alone, but frequently did with a companion for sociability.

She first met Ekstrom on a street corner in Kansas City, after night, in the forepart of December, 1914. He approached her with his card, said he was a physician and that he saw by her dress that she was a nurse. They boarded a street car and in twenty minutes he had made love to her. However she gave him her card and they separated by his leaving the car and she proceeded on to where she was engaged in service. During a period of perhaps two weeks, he called her on the phone and finally, at his request, she met him at eight o'clock at night at the Union Station in Kansas City and they drove in company with a friend of hers, to a hotel where the friend was left and they went to the grill room. On the way to the hotel he had flourished a bottle of whiskey but did not drink. At the grill room he drank, but plaintiff could not remember whether she did or not. On this occasion he proposed marriage. She said that it was a business proposition and not supposed to be a love match. The next day, the 19th of December they became engaged and the second day thereafter were married; and he gave a bogus check of $25 to the preacher for his fee, the latter paid $2.75 protest charges. He told her he was a dentist with a large practice and resided in Omaha. During this short acquaintance and courtship she made no in-

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quiry about him. She did not even inquire where he was staying in Kansas City, saying that it was nothing to her; and after they were married she didn't ask and said she didn't care where he stayed.

Two strange men dined with them at a hotel the night of the marriage and immediately after, he went out with them for a carouse, leaving her behind. He came back in the night "real drunk." She said she did not chide him; that she was not annoyed and when asked if it "bothered her any," answered. "Why no." He had no baggage and just before he retired some of the hotel people came to the door and demanded pay for the room. He went out and had the gentleman called to vouch for him whose wife plaintiff was waiting on. It seems that on next day plaintiff went out to see this lady and that Ekstrom called for her in a cab, but had no money to pay the driver and got it from plaintiff. They drove away and Ekstrom asked her to cash a ten dollar check for him. She agreed to do it but told him that was the last, that she was "tired of it." It was bogus but with the money they went to a Cafe for supper, where they had a drink or, as she called it, "an appetizer." Then (the second night of the marriage) he again went out and when he returned she was asleep and did not know whether he was drunk or not.

The next day was the day of shopping at defendant's store and the arrest. He had nothing with which to pay for their breakfast and she, notwithstanding her vow the day before that she would not, was forced to finance him again. Before going to the store they stopped at a "beauty parlor" where plaintiff had her hair dressed etc., the bill being $8.50 was paid for by Ekstrom by a bogus check for $10 accepted because of the plaintiff's introduction. This was after Ekstrom had told her that he had been to the bank and arranged for money.

They then went to defendant's store and she testified that all of this time she had seen that he had no money except what she gave him. She introduced him and when

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asked if she did not represent to defendant that he was wealthy and his checks alright said she did not remember, but she would not deny that she did. She bought a hat for $23, a fur coat for $125, and a muff for $25, a pair of shoes for $7 and a pair of gloves for $2. She put these articles on in the store; and in addition bought a dress, underwear, etc. She knew Ekstrom was paying for these goods with checks and she said to him: "You will have to get it fixed up with somebody. You know I am not going to O. K. any more of your checks for you." In payment for the hat, coat and muff, he gave his check on the Kansas City bank for $173, but defendants soon found that he had no funds there. As plaintiff continued her purchases and while having the dress fitted he remonstrated, but she told him she would do as she pleased and suggested to him that he get another check cashed so that he would have some ready money. He gave his check for the dress and another check for fifty dollars for the shoes, receiving back from defendants $43 in change.

When defendants saw that every thing was being paid for by check, inquiry was made of the Kansas City bank and word received that he had no funds. When confronted with this he said he forgot to say that his money was in the Omaha banks and that he intended the checks to be drawn on a bank in that city. Inquiry there by telephone resulted in the same answer of no funds. When report was made to defendants that the checks were bogus, an officer was spoken to and after full investigation had disclosed that the goods had been feloniously obtained, the officer took both plaintiff and Ekstrom to the station where she was confined in the "hold-over" during that night and the next day, when she delivered up the clothes she had obtained and was discharged; but he was prosecuted and sent to the penitentiary.

Though defendants deny ordering the arrest, or taking any part in her incarceration, we will save space by conceding that there was evidence sufficient for the jury to connect them with it. And we may also concede,

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without detail, that if plaintiff were innocent and without fault, there was sufficient indignity and humiliation to justify the amount of the verdict.

Plaintiff has invoked that rule of law that a wife is presumed to be under the influence and coercion of her husband to such degree that she is incapable of committing a crime in his presence and cites us to State v. Miller, 162 Mo. 253. The affirmative testimony of plaintiff herself abundantly rebuts all presumption in the direction of exculpation. She admitted that Ekstrom remonstrated against the extent of her purchases and that she suggested and encouraged the drawing of some of the checks. Asked if Ekstrom had not objected to her buying a dress and she told him "to go and mind his own business," that "she was doing that," that she "would buy what she pleased," she answered, she did not remember, but that she would not deny it. The presumption in favor of the wife is not conclusive and is rebuttable. State v. MaFoo, 110 Mo. 7; State v. Miller, supra.

We have already called attention to the fact that plaintiff alleged the arrest and imprisonment were without probable cause and that she tried her case on that theory and she concedes that she must abide by that theory in this court. In order then to sustain the judgment she must have shown not only her innocense, but that defendant was without probable cause to believe her guilty. [Russell v. Shuster, 8 W. & S. 308, 310; Fuqua v. Gambill, 140 Ala. 464, 468; Rich v. McInerny, 103 Ala. 345, 354; Pritchett v. Sullivan, U. S. C. C. A., 182 Fed. 480, 484; Murphy v. McAdory, 183 Ala. 209.] In 19 Cyc, 339, under the subject "False Imprisonment," it is stated: "It has been held that if plaintiff alleges malice and want of probable cause, although unnecessarily, he must prove those elements."

Probable cause "which will relieve a prosecutor from liability, is a belief by him in the guilt of the accused, based upon circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man." [Vansickle v. Brown, 68 Mo. 627, 635; Stubbs v. Mulholland, 168 Mo. 47, 74.] "Probable cause

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does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party commencing the prosecution." [James v. Phelps, 11 Ad. & El. 483, 489.] If we applied this definition to the facts of the case we would be relieved from the necessity of saying that plaintiff was a party to obtaining the goods on bogus checks, by acquiescence, if not by participation. For it seems too plain for dispute that not only were the circumstances sufficiently strong to induce belief of her complicity, in the mind of a reasonable man, but it would have required a most dense and abnormal mind, not to have believed it.

But we need not put our judgment on that ground for, that she was aware, or had every reason to believe, that her new acquaintance and new husband, was getting the goods by use of false checks is established by her own testimony. While not so stating it, in words, the trend of the argument in her behalf would lead one to believe that she was an innocent, giddy and foolish young girl, whereas, to recapitulate, she was a smart woman thirty-four years old, who had been married and divorced. She picked up this swindler on a street corner after night, exchanged cards with him and allowed him to make love to her in the first few minutes of their acquaintance. She shortly married him without inquiry as to who he was. She saw he was low and drunken, without a cent of money and with no more lugage than a night shirt. He immediately begun the cashing of checks on her vouching, until she refused further aid in that line. With this and much more, she went with him to obtain a valuable outfit of apparel at defendant's expense, which she immediately put on her person instead of having it delivered later at the hotel. She encouraged him in making checks to defendant, not only in payment of goods, but in getting money. Finally, when put under arrest before getting away from the store, she made no offer of restitution. To say she did not believe that her husband was uttering bogus checks would be to deny her capacity to appear in court, or employ counsel in defense.

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What, in reason, were defendants to do? The situation was as she, herself, had laid it out. Defendants were the innocent victims. She was carrying away their goods and they holding fraudulent checks. Should they be required to stand by without effort to save themselves? If, in such circumstances, one's call upon the law is to penalize him, it would quickly lead to dire results in other directions.

We think the judgment is without legal support and hence reverse it. All concur.

L. A. LAUGHLIN, Respondent, v. UNION PACIFIC RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, June 11, 1917.

1. **ATTORNEY'S LIEN: Removal of Action to Federal Court: Judgment: Action in State Court for Deforcement.** A plaintiff was injured by a railroad company and employed an attorney on a contingent fee to bring an action against the company. He notified the company of his lien. Before suit was brought the injured party employed other attorneys who brought the suit in the State court and it was removed to the Federal court, where he obtained judgment, which the defendant paid to the Clerk, who afterwards paid it to the attorneys who brought the suit, and the judgment was satisfied. It was *held*, that the attorney could maintain a suit in a State court against the railway company for deforcement of his lien.

2. **———: Substantive Right: Federal Court: Notice: State Court.** An attorney's lien is a substantive right given him by a State law and he may enforce it in a Federal court where the judgment was rendered. Or, if judgment be rendered in the Federal court and paid by defendant, with notice of the lien, the attorney may maintain an independent action in a State court against the defendant for deforcement of his lien.

Appeal from Jackson Circuit Court.—*Hon. Harris Robinson*, Judge.

AFFIRMED.

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R. W. Blair and *Watson, Gage & Watson* for appellant.

L. R. Gates for respondent.

ELLISON. P. J.—A grecian named Xedes was injured by defendant. On the recommendation of a fellow countryman, named Coliopolus, he employed plaintiff to bring an action against defendant for damages. He made such employment in writing; agreeing to give plaintiff fifty per cent of what he recovered, or of any sum he should get in a compromise, or other settlement of the claim, but at all events plaintiff was to receive one hundred dollars.

For some undisclosed reason, Xedes employed other attorneys and they brought an action for him in the State court which was afterwards removed to the Federal court at Kansas City, Missouri. The case was tried in the latter court and judgment rendered for $550 and the money paid by defendant to the Clerk of that court, from whom it was drawn by the attorneys who brought the suit and the judgment satisfied. Plaintiff had no notice or knowledge of the judgment or that it was paid until long afterwards.

After plaintiff's employment, and before the other attorneys had been employed to supplant him, he served written notice on defendant of his agreement with Xedes and of his claim of an attorney's lien for a certain per cent of whatever amount he obtained in settlement of said claim.

Plaintiff did nothing under his employment, other than prepare for it, for the reason that he was prevented by the action of Xedes in employing other attorneys.

After the notice of lien was served Xedes attempted a settlement with defendant's attorneys who told him of plaintiff's claim and refused to settle with him.

Afterwards plaintiff brought this action before a justice of the peace, to recover $275, being one-half of the judgment obtained. He prevailed both in the justice and the circuit court on appeal, and defendant had brought the case here.

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Defendant makes earnest effort to show that as the judgment was rendered in the Federal court, the amount paid in to the Clerk and by him paid out to the attorneys of record representing the plaintiff in the judgment, the present lienor plaintiff can have no cause of action; it being insisted, in this respect, that an attorneys lien under the State law cannot attach to a judgment or proceeding in a Federal court, that court being regarded as foreign to the State. We think the point not well made. The lien is a substantial right which the attorney has vouchsafed to him by the local State law, and it will be enforced in the Federal court for such State, as any other claim arising under a State law. It has been so recognized. [Brown v. Morgan, 163 Fed. 395; Cain v. Hockensmith, W. & C. Co., 157 Fed., 992.] And the removal, of a case from the State to the Federal court was not allowed to affect an attorney's lien allowed by the law of Alabama. [Central Railroad v. Pettus, 113 U. S. 116.]

In view of the fact that this case was brought in a court other than the one rendering the judgment, and in which court that judgment was satisfied without the consent of knowledge of this plaintiff whose claim, if not now based upon our attorney's lien statute (Sec. 965, R. S. 1909) has that statute for its support, it is proper that we consider the propriety of the remedy sought by plaintiff. The statute, after giving the lien and providing for notice, proceeds to declare that any defendant "who shall, after notice served as herein provided, in any manner, settle any claim, suit, cause of action, or action at law with such attorney's client, before or after litigation instituted thereon, without first procuring the written consent of such attorney, shall be liable to such attorney for such attorney's lien as aforesaid upon the proceeds of such settlement, as per the contract existing as hereinabove provided between such attorney and his client."

It is decided in Wait v. Railroad, 204 Mo. 491, 502; O'Connor v. Transit Co., 198 Mo. 622, 643; Taylor v. Transit Co., 198 Mo. 715; Curtis v. Railroad, 118 Mo.

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App. 341; Yonge v. Railroad, 109 Mo. App. 235, and Young v. Renshaw, 102 Mo. App. 173, that if a settlement be made before judgment without the lienor attorney's consent, he need not press the suit forward to establish his lien, but may have an independent action against the settling defendant "not possibly, strictly to enforce the lien, but against him who deforced the lien, for the value thereof." In the Wait case, at page 502 of the report, it is stated by the Supreme Court, that it had not been decided whether an independent action could be maintained against a settling defendant after final judgment.

But we believe the trend of that case, and the others cited, is along a line which leads to the conclusion that an action lies after judgment against the settling defendant. In fact we understand it to be, in effect, so announced in the Wait case at page 503 of the report. It is true that this plaintiff might have elected to go into the Federal court and asked to have the satisfaction of the judgment set aside and his rights protected. If he had, doubtless that court, as in any other case involving the enforcement of local laws, would have taken action on his complaint. But after the judgment was entered and satisfied, the complaining attorney was not confined to a request to the court which rendered the judgment, to set aside the satisfaction, and he could maintain his claim in some other court in a direct action against the defendant for deforcement of his lien. Other objections to the judgment are not considered substantial and it is accordingly affirmed. All concur.

JAMES McKIM, Appellant, v. METROPOLITAN STREET RAILWAY COMPANY, Respondent.

Kansas City Court of Appeals, June 11, 1917.

1. **NEGLIGENCE: Joint Wrongdoers: Release of One: Covenant not to Sue. A release of one of several joint *tort feasors* discharges all; but a covenant not to sue one of several will not discharge the others.**

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2. **WRITTEN CONTRACT: Parol Evidence: Parties: Strangers.** Though neither party can have parol evidence to vary the terms of a written contract, this rule does not apply to strangers or third parties.

3. **———: ———: Stranger: Litigant: Parol Evidence: Both Parties.** If a stranger to a written contract litigating with one of the parties to such contract, he may have parol evidence to show that it does not express the real agreement; and in such case the other litigant, though a party to the contract, may also have such evidence.

4. **MISTAKE OF LAW: Contract: Reform.** Though ordinarily there is no relief against a mistake of law, yet if by mutual mistake as to the legal effect of a written contract, it does not express the terms of the contract, it may be reformed so as to make it conform to the real contract made.

Appeal from Jackson Circuit Court—*Hon. Daniel E. Bird,* Judge.

REVERSED AND REMANDED.

Cowherd, Ingraham & Durham for appellant.

Clyde Taylor and *Charles A. Stratton* for respondent.

ELLISON, P. J.—Plaintiff was a conductor in one of defendant's street railway cars. He was injured at a crossing with the tracks of the Missouri Pacific Railway Company. He charged his injury to the joint negligence and wrong of that company and defendant. For the sum of six hundred dollars he released the Missouri Pacific Company by duly executed written paper. He then brought the present action against the defendant, the street railway company and the latter in its answer, pleaded such release as operating its own discharge also. Plaintiff then in his reply sought to avoid the release by a plea that it was intended only as a covenant not to sue the Missouri Pacific, and that, by mistake, it was made to read as a release; and at the trial he sought to prove this by parol testimony and the court refused to permit him. Judgment was rendered for defendant.

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We decided in Arnett v. Railroad, 64 Mo. App. 368, that a release of one of several joint tort-feasors discharge all; but that a covenant not to sue one of several would not discharge the others; and so we have since repeatedly decided. [McDonald v. Grocery Co., 184 Mo. App. 432; Pickett v. Wren, 187 Mo. App. 83; Hawkins v. Railroad, 182 Mo. App. 323; Laughlin v. Powder Co., 153 Mo. App. 508.] And so it has been determined by the St. Louis Court of Appeals. [Judd v. Walker, 158 Mo. App. 156; Lumber Co. v. Dallas, 165 Mo. App. 49.]

The parties hereto concede this to be the law, but the proposition presented by plaintiff is that he has a right to show, by parol testimony that the release paper does not contain the real contract between him and the Missouri Pacific—that the real agreement was one of covenant not to sue instead of release. He recognizes the rule that in the absence of fraud, accident or mistake, parol evidence is not admissible to vary the terms of a written contract; but claims that such rule only applies to the parties and privies to the contract and has no application to strangers, and insists that the defendant railway company is a stranger to that contract, and this last insistence is the chief point of difference between the parties. That a third party, or stranger, cannot invoke the rule is settled by authority and good reason. [1 Greenleaf on Evidence, sec. 279; McKee v. St. Louis, 17 Mo. 184, 190.]

That the defendant street railway company is a stranger to the contract in this case, and having had nothing to do with such contract, is not bound by it, and, if it should be to its interest to do so, could introduce parol evidence to show that the writing did not contain the contract, must be admitted. If the defendant may question it, then, also, may the plaintiff, though one of the parties to it, since it would be unjust to give the privilege to one of the litigants and deny it to the other. [McMaster v. Ins. Co., 55 N. Y. 222, 234; O'Shea v. Railroad, 105 Fed. 559; Nashville Interurban Ry. v. Gregory, 193 S. W. 1053, 1057 (Tenn.); Dunn v. Price, 112 Cal. 46, 51; Johnson v. Von Scholley, 218 Mass. 454, 457, 458.]

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There are two cases decided by the Supreme Court of Massachusetts, and perhaps some others, that seem to be opposed to this view. [Brown v. Cambridge, 3 Allen 474; Goss v. Ellison, 136 Mass. 503.] But we think the view we have taken has the better support, and we gave expression to that view in the case of Dennison v. Aldrich, 114 Mo. App. 700, 708. [See, also, Laughlin v. Powder Co., 153 Mo. App. 508.]

We now come to what we regard as a point equally serious to that above discussed as to the right to vary the terms of the contract. Of course unless the force of the release is avoided plaintiff must fail. The first introduction of such release appears as new matter in defendant's answer and therefore the attempted avoidance thereof and the grounds therefor, must appear in plaintiff's reply and we find from it that the ground of avoidance is that it was executed by mistake. There is no allegation of fraud. It is true that in the first part of the reply it is alleged that Larrimore (who was acting for the Missouri Pacific Co.) "wrongfully" procured plaintiff to sign the release, yet that refers merely to the effect of what Larrimore did, for the entire pleading affirmatively and repeatedly alleges that Larrimore was acting in good faith and that he believed and plaintiff believed that the contract was a covenant not to sue and not a release. The reply clearly shows there was no mistake by either party as to what was written in the contract, and that the "mistake and misapprehension" was as to the *legal effect* of the contract, it being explicitly stated that they thought it amounted to a covenant not to sue.

The contest between the parties is thus narrowed down to the question whether plaintiff is entitled to any relief from a mistake of law, that is, a mistake as to the legal effect of an instrument which does not contain the real agreement made. It is broadly stated that one knowing the facts is not entitled to relief against a mistake of law (Hendrix v. Wright, 50 Mo. 311) and this applied to plaintiff would prevent any relief to him under his pleading. But the rule is softened so that if a written in-

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strument, though its contents are known to the parties, fails, by reason of mutual mistake as to its legal effect, to state the real contract made by the parties, it may be reformed so as to express, in proper terms, the contract as made. [Corrigan v. Tiernay, 100 Mo. 276; Williamson v. Brown, 195 Mo. 313, 331.]

The foregoing consideration makes necessary to notice other points suggested by defendant as fatal to plaintiff's case.

It is said that the petition is insufficient in that it stulifies and contradicts itself. There are parts of the petition to which the criticism will apply and if an objection had been interposed it probably would have been sustained by the trial court. But having gone to trial everything save a failure to state a cause of action was waived. For we do not believe that the manner of statement was contradictory to such degree as to fail entirely to allege a cause of action. [O'Brien v. Transit Co., 212 Mo. 59, 68, 69.]

But in addition to this, there was a further allegation which in any event saved the petition from the charge of total failure to state a cause of action; viz: "And that the motorman employed by the defendant and who was in charge of the motive power of said car at the time of the injury to the plaintiff as hereinafter set out, negligently and carelessly failed to stop said car before reaching the track of the said The Missouri Pacific Railway Company, . . . [Sec. 3303, R. S. 1909.]

The trial was not had in accordance with the views herein expressed and the judgment is reversed and cause remanded. All concur.

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M. T. WARREN, Respondent, v. MISSOURI AND KANSAS TELEPHONE COMPANY, Appellants.

Springfield Court of Appeals, June 26, 1917. Rehearing Denied July 24, 1917.

1. **TELEPHONES: Care Required of Company Maintaining.** A telephone company is required to use the highest degree of care practical in making and keeping safe the use of its telephone apparatus but it is not an insurer.

2. **PLEADING: Sufficiency of Petition: Test.** A petition is not always to be judged by the strict rules of logic or absolute accuracy in its statements, but rather by whether it fairly informs the defendant of the issues to be tried.

3. ———: **Petition: Sufficiency of: Not Same Test as for Instruction.** An instruction imposing on defendant the duty of keeping its telephone equipment safe, instead of using the highest degree of care to that end would be erroneous, but a petition will not be held fatally defective on that account, especially after verdict.

4. ———: **Surplusage in Petition: Immateriality.** Where a statement in a petition is merely a statement of law, it may be regarded as surplusage and hence its accuracy is not material.

5. **TELEPHONES: Injury from Shock: Res Ipsa Loquitur.** Where plaintiff answering a telephone call was injured by a shock when she took hold of the transmitter and receiver, the occurrence was so unusual and contrary to what might be expected under such circumstances as to show that there was something wrong with the instrumentalities solely under the control of the defendant telephone company and the doctrine of *res ipsa loquitur* would apply.

6. **PERSONAL INJURIES: Destructive Agencies: Care Required in Guarding.** Because storms and floods and lightning are destructive it is necessary to use the highest degree of care and skill to guard against them in the use of instrumentalities made dangerous thereby.

7. **ELECTRICITY: Injuries from: Judicial Notice.** The courts take notice that static electricity or lightning is likely to get on and pass over wires carrying manufactured el... ...ty.

8. ———: **Duty of Electric Company to Safeguard Against Lightning.** An electrical company whose wires enter a building is bound to anticipate that unless devices are installed to prevent, lightning may follow its wires into the building and result in personal injuries.

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9. ———: **Duty of Electric Company to Safeguard Against Lightning.** If lightning is conducted to or into a building through the negligence of the owner of the wires entering such building failing to use preventive devices, the owner may be liable; though the lightning may be considered an act of God the carrying of it into the building by wires may be considered an act of the owner of such wires.

10. ———: ———: **Presumption in Case of Injuries.** The dangerous character of electricity is generally known but the means by which it is minimized are known only to those who have special knowledge and skill. Those who engage in the business of serving the public with telephones must be held to possess and employ, the requisite knowledge to protect its patrons so far as practicable from dangers incident to the business. And this is true whether such dangers arise from the currents employed by them or such as may be reasonably expected to get on the wires from other sources.

11. **PERSONAL INJURIES: Negligence: Accident Extraordinary: Res Ipsa Loquitur.** In case of personal injuries where the thing causing such injury is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, the doctrine of *res ipsa loquitur* applies.

12. **TELEGRAPHS AND TELEPHONES: Injury from Shock: Negligence: Jury Question.** Whether or not a telephone company discharged the burden of proving lack of negligence causing injuries to one who was using a telephone operated by defendant company was a question for the jury.

13. ———: **Negligence: Res Ipsa Loquitur: Burden of Proof.** Action against a telephone company on account of personal injuries occasioned by a shock received while properly using a telephone installed by defendant company. The burden of proving that the presence of excessive electricity which caused the injury was not due to negligence of the company in failing to use the highest degree of care practical rested on such company.

Appeal from Greene County Circuit Court.—*Hon. Arch A. Johnson,* Judge.

AFFIRMED.

Sebree & Orr and *D. E. Palmer* for appellant.

Hamlin, Collins & Hamlin for respondent.

STURGIS, J.—It is practically agreed that plaintiff was injured by an electric shock in attemting to use

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one of defendant's telephones; and so a jury found. The defendant appeals from a judgment in plaintiff's favor.

The plaintiff's petition, which is assailed as being insufficient, alleges that defendant owned, controlled and operated a telephone system in Springfield, Missouri; that same was operated by the use of wires, receivers, transmitters and electricity; that plaintiff was in the employ of one White, for whose use in his butcher shop defendant had installed one of its telephones; that it was the duty of defendant to keep its telephones, wires and apparatus in a safe condition so as to be used by patrons with safety; that plaintiff, in discharge of her duties and while using due care, attempted to use said telephone in answer to a ring or call of same "and in so doing took hold of the transmitter with one hand and the receiver with the other at which time, by reason of the negligence of the defendant in the operation of the telephone system as aforesaid, she was suddenly struck by electricity and instantly and violently knocked down by reason whereof" she suffered injuries to her damage, etc. Plaintiff's evidence supports these allgations.

The defendant attacks the petition as charging negligence in general terms without specifying the facts showing negligence and that the petition fails to state facts to which the rule of *res ipsa loquitur* would apply. Defendant's argument is that since plaintiff alleged that defendant operated the telephone system by use of wires, receivers, transmitters and electricity and that defendant's duty was to keep its telephones, wires and apparatus in a *safe condition* so that same could be used *with safety,* the allegations that the injury resulted "by reason of the negligence of the defendant in the operation of its telephone system as aforesaid" can refer only to the duty previously alleged, to-wit: to keep the telephones and apparatus used in connection therewith in a safe condition. It is then argued that the law does not require defendant to *keep* its telephones and equipment, in a *safe condition* or so as to be used *with safety,* but only to use due care (whether ordinary care or the highest degree of care the authorities are said to be in conflict)

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to keep same safe and so as to be used with safety. The defendant would then have this court draw the conclusion that since plaintiff has not alleged a duty which the law requires the alleged violation of a duty not required is not an allegation of negligence.

We do not agree that there is any conflict of authorities in this State that defendant is required to use the highest degree of care practical in making safe the use of its phones but we do agree that, strictly speaking, defendant is not required to *keep* its telephones and apparatus used therewith *safe* or so as to be used *with safety*. It is only required to use the highest degree of care practical in this respect and is not an insurer. The instructions given are to this effect. The petition does not accurately state defendant's duty and an instruction imposing on defendant the duty to keep its phones and equipment safe instead of using the highest degree of care to that end might properly be held erroneous. No case is cited holding that a petition is fatally defective on this account, especially so after verdict. A petition is not always to be judged by the strict rules of logic or absolute accuracy in its statements, but rather by whether it fairly informs the defendant of the issues to be tried. The petition was not attacked in any way in the trial court and we decline to hold it fatally defective.

Moreover the clause of the petition stating defendant's duty with reference to keeping the phones safe for use is only a statement of the law and may be entirely rejected as surplusage. Being surplusage, its accuracy is not material.

The next question is whether the facts pleaded and proved warrant the application of the doctrine of *res ipsa loquitur*. The plaintiff proved the alleged facts that when she attempted to answer a call or ring of the phone and took hold of the receiver and transmitter in the usual way, she received a severe shock rendering her unconscious. The defendant, after its demurrer to the evidence was overruled, undertook to explain the cause of the injury and exonerate itself from any negligence.

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It showed that the currents of electricity used in the operation of the phone were of such low voltage that the shock could not have been caused thereby. "The defendant then accounts for the shock plaintiff did receive" by showing that a thunderstorm with nearby flashes of lightning occured at or about the time of the injury. The evidence raises a strong inference that plaintiff's shock was caused by lightning striking the wires at some point and then passing along same to this telephone.

Does the doctrine of *res ipsa loquitur* apply to the facts thus pleaded and proved? There is less doubt on this point as to the facts pleaded than to those proved, for it is only by the proof that the element of lightning is brought into the case. Without that element the thing complained of, to-wit: the electricity, wires, receivers, transmitters, etc., were clearly under the sole control and management of the defendant. The plaintiff had no control of these instrumentalities and no means of knowing the cause of her injury except the bare fact that the defendant furnished a telephone for her use and held it out as being safe for that purpose; that she attempted to use it for the purpose and in the way it was intended and in so doing was injured. This occurrence was so unusual and contrary to what usually happens as to show that something was wrong and this something wrong being with the instrumentalities solely under defendant's control the doctrine of *res ipsa loquitur* applies. [Shearman & Hedfield on Negligence, sec. 58b; Curtis, Law of Electricity, sec. 592.]

With the element of lightning introduced in the case (by defendant, however), the defendant asserts that the necessary basis of this doctrine is lacking because the current of electricity from the lightning was not under defendant's control. This argument is more plausible than in accord with sound legal reasoning. Storms and floods are not under the control of human agency, but if a passenger is injured by derailment of a train the doctrine of *res ipsa loquitur* would not disappear by a mere showing that the track was undermined by water

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from a rainstorm. The very fact that storms and floods and lightning are destructive makes it necessary to use the highest degree of care and skill to guard against same in the use of instrumentalities made dangerous thereby. The courts take notice that static electricity, or lightning, is likely to get on the pass over wires carrying manufactured electricity, (Melcher v. Investment Co., 189 Mo. App. 170, 182, 174 C. W. 455; Curtis' Law of Electricity, sec. 457 and sec. 510, p. 770), and the frequency of injuries received from this source shows a danger that should be guarded against. A company whose wires enter a building "is bound to anticipate that unless devices are installed to prevent it, lightning may follow its wires into the building" resulting in personal injury. "If lightning is conducted to or into a building through the negligence of the owner of the wires entering such building the owner may be liable; though the lightning may be considered an act of God, the carrying of it into the building may be an act of the owner." [Curtis' Law of Electricity, sec. 455; Jones on Telegraphs and Telephones, sec. 196a.]

The defendant owning and controlling this telephone and all the appliances used in connection therewith installed it in this place of business for plaintiff's use at all times without regard to weather conditions. The defendant company in effect said to plaintiff that, while we know the ordinary danger of lightning passing along wires such as connects with this phone, especially during thunderstorms, that is our business and we will guard against it; you may use this phone regardless of weather conditions and we will see that same is safe in so far as the highest degree of skill and care commensurate with the danger will make it so. That the doctrine of *res ipsa loquitur* applies in such cases is attested by many authorities. [Jones on Telegraphs & Telephones, sec. 198; Curtis' Law of Electricity, secs. 597, 594; 1 Joyce on Electric Law, secs. 445a, 445f; 2 Joyce on Electric Law, sec. 1048, p. 1551; Griffith v. New England T. & T. Co., 72 Vt. 441, 52 L. R. A. 919; Southwestern Bell Tel. Co. v. McTyer (Ala.),

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34 So. 1020; Alabama City Etc. Co. v. Appleton (Ala.), 54 So. 638, 26 Ann. Cas. 1181; Evans v. E. Kentucky Tel. & Tel. Co. (Ky.), 99 S. W. 936; Denver Con. Elec. Co. v. Lawrence (Colo.), 73 Pac. 39; Hoover v. R. Co., 159 Mo. App. 416, 420, 140 S. W. 321; Heilberger v. Tel. Co., 133 Mo. App. 452, 113 S. W. 730.] In Byron Tel. Co. v. Sheets, 122 Ill. App. 6, 10, the court said: "Its dangerous character is generally known, but the means by which its dangers are minimized are only known to those who have special knowledge and skill. In the absence of stipulations to the contrary those who engage in the business of serving the public with telephones must be held to possess and employ the requisite knowledge and skill to protect its patrons, so far as practicable, from the dangers incident to the business, whether those dengers arise from the currents employed by them or such as may reasonably be expected to get on the wires from other sources." The facts of the present case clearly bring it within the rule stated in Scott v. London Dock Co., 3 H. & C. 596, that "Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation, that the accident arose from want of proper care." The defendant was not held not liable, as defendant contends, in Strack v. Tel. Co., 216 Mo. 601, 116 S. W. 526, because the current which inflicted the injury was not under defendant's control, but because the defendant could not be held to have reasonably anticipated that any person would come in contact with the wires.

The court therefore properly instructed the jury that the defendant was liable whether the current causing this shock was lightning or manufactured electricity providing same could be guarded against by the exercise of a high degree of care on defendant's part. It also correctly refused to instruct that if the shock was caused by atmospheric electricity and not by a current under defendant's control, defendant was not liable.

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The defendant introduced evidence tending to show absence of negligence on its part; that it used a high degree of care in maintaining and operating its telephone system and had in use safety appliances such as lightning arresters, fuses, etc.; that there was no discovered defect in these appliances. Without quoting or commenting on this evidence it is sufficient to say that it is yet a question for the jury to say whether defendant had discharged the burden of proof cast upon it. The credibility of the explanation and its sufficiency were questions for the jury and the prima facie case of the plaintiff is not necessarily overthrown by uncontradicted evidence that the appliances were constructed and operated in a proper manner. [Curtis' Law of Electricity, sec. 592, p. 902; Kelly v. City, 185 Mo. App. 55, 60, 171 S. W. 966.]

The defendant also complains of error in instructing the jury to the effect that if plaintiff was injured by reason of a current coming through or over the telephone then it devolved upon defendant to prove that the presence of said excessive electric current was not due to its negligence in failing to use the highest degree of care in installing and maintaining said telephone. The alleged error consists in thus shifting the burden of proof to defendant to exonerate itself from negligence after a finding that plaintiff was injured in the manner mentioned. The case of Sweeney v. Erving, 228 U. S. 233, is cited as holding that, even when the doctrine of *res ipsa loquitur* applies, it is only a rule of evidence supplying plaintiff with proof of negligence by the mere proof of the circumstances of the injury; but that the burden of proof remains with plaintiff and is not shifted to defendant to show absence of negligence. This case does so hold and such is the law in some jurisdictions. In this State, however, the law is in accordance with the instructions given. [Price v. Met. St. Ry., 220 Mo. 435, 457, 119 S. W. 932, and cases cited.]

This disposes of all the points raised by plaintiff's brief and leads to an affirmance of the judgment. *Farrington, J.*, concurs; *Cox, P. J.*, dissents.

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A. J. POOR, Doing Business as A. J. POOR GRAIN CO., Respondent, v. WESTERN UNION TELEGRAPH CO., Appellant.

Kansas City Court of Appeals, June 11, 1917.

1. **DAMAGES: Telegram: Mistake in Transmission: Action by Sendee: Basis of Suit.** A suit for damages by the sendee of a telegram for mistake in transmission is not on the contract between the sendee and the defendant, although the latter's duty to the sendee arose because that contract was created and performance thereof was undertaken by defendant, but is based upon the violation of defendant's duty to correctly transmit and deliver the message. This public duty the defendant owed the sendee even though the latter was not an immediate party to the contract, and hence the sendee has a right of action based upon the violation of that public duty.

2. ———: ———: **Interstate Commerce: Governed by Federal Law.** A telegram, being from a point in one State to a point in another, is an interstate message and its transmission an act of interstate commerce. The interstate commerce statutes bring interstate telegraph companies within the terms and subject to all the provisions of the Interstate Commerce Law so far as applicable. And the rule of decision heretofore in force in this State respecting the force and effect of provisions in the contract by which a message is transmitted are no longer controlling with respect to interstate messages.

3. ———: ———: ———: **Rates.** The assertion of the power of Congress over the subject of interstate telegrams and the duties of companies engaged in transmitting them expressly provide for uniformity of rate, of classification, and of service, and necessarily of responsibility therefor.

4. ———: **Negligence in Transmission: Evidence.** In an action by the sendee of an interstate telegram against the company for mistake in transmission the evidence is examined and *held* to make out a prima-facie case of at least "ordinary negligence" as the term is used by the Federal courts for which a stipulation on the back of the telegram limiting liability provided.

5. ———: ———: ———: **Stipulation: Measure of Damages; Reasonableness.** The sendee of an unrepeated interstate telegram, sent subject to a stipulation on the back of the message that the company shall not be liable for a mistake in transmission of any unrepeated message beyond the amount charged for sending the same, can recover only the amount paid for sending the message. The question of the reasonableness or of the real purpose and effect of such a stipulation is not open to the consideration of the State court, being a matter for the Interstate Commerce Commission to pass on.

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Appeal from Jackson Circuit Court—*Hon. Harris Robinson,* Judge.

AFFIRMED (*Conditionally*).

Albert T. Benedict, S. J. McCullough and *New, Miller, Carmack & Winger* for appellant.

Harold M. Noble and *McCune, Caldwell & Downing* for respondent.

TRIMBLE, J.—This is a suit to recover damages sustained by reason of a mistake negligently made by defendant in the transmission of a telegram to plaintiff Poor was a grain broker and commission merchant doing business in Kansas City, Missouri, under the name of A. J. Poor Grain Company. On August 4, 1913, a customer of plaintiff by the name of Townsdin, residing in Randall, Kansas, delivered to defendant's agent at that place a message to be sent to plaintiff which read as follows:

"Buy fifteen thousand Dec. wheat around eighty-nine."

The message which was delivered to plaintiff read:

"Buy fifty thousand Dec. wheat around eighty-nine."

As written and directed to be sent by Townsdin, the message was an order to buy fifteen thousand bushels of wheat, but as delivered to Poor it was an order to buy *fifty* thousand bushels.

The change arose through the negligence of the defendant. As directed in the telegram he received, Poor bought fifty thousand bushels and by telegram notified Townsdin of that fact. The latter immediately telephoned Poor that he had ordered and wanted only fifteen thousand bushels. Poor went to the defendant's office and told the agent of the mistake and asked him what disposition he should make of the extra 35000 bushels. The agent agreed to take the matter up with the company's general agent, but being unable to get any directions from him, informed plaintiff of that fact and told Poor to close out the wheat as best he could and put in his claim for the loss. Poor sold the extra wheat and

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sustained a loss of $712.50. This suit was then brought to recover that amount as the damages arising from defendant's wrongful failure to correctly transmit and deliver said message. Plaintiff obtained a verdict and judgment for the full amount sued for, and defendant has appealed.

The telegram was written by Townsdin on one of defendant's ordinary telegram blanks, which, on its face, directed the telegraph company to "Send the following message subject to the terms on the back hereof, which are hereby agreed to." On the back of the message was printed the following:

"All messages taken by this company are subject to the following terms, which are hereby agreed to. To guard against mistakes or delays, the sender of a message should order it repeated, that is, telegraphed back to the originating office for comparison. For this, one-half the unrepeated message rate is charged, in addition. Unless otherwise indicated on its face, this is an unrepeated message and paid for as such, in consideration whereof it is agreed between the sender of the message and this company as follows: 1. The company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially valued; . . . 2. In any event the Company shall not be liable for damages for any mistakes or delays in the transmission or delivery, or for the non-delivery of this message, whether caused by the negligence of its servants or otherwise, beyond the sum of fifty dollars, at which amount this message is hereby valued, unless a greater value is stated in writing hereon at the time the message is offered to the Company for transmission, and an additional sum paid or agreed to be paid based on such value to one-tenth of one per cent., thereof."

The message was an unrepeated message and the charge was the usual and regular price for sending a

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telegram of that length and distance, to-wit, forty cents, which was paid by the sender Townsdin.

The suit is not on the contract between the sender and the defendant, although the latter's duty to the sendee arises because that contract was created and performance thereof was undertaken by defendant. The suit is based upon the violation of defendant's public duty to correctly transmit and deliver the message. This public duty, arising upon the creation of the contract of transmission, the defendant owed the sendee even though the latter was not an immediate party to the contract. Hence plaintiff, as sendee, has a right of action based upon the violation of that public duty. [Western Union Tel. Co. v. Burris, 179 Fed. 92; State Bank of Commerce v. Western Union Tel. Co., 142 Pac. 156; Bailey v. Western Union Tel. Co., 76 Atl. 736; Western Union Tel. Co. v. Holder, 174 S. W. 552; Eureka Cotton Mills Co. v. Western Union Tel. Co., 70 S. E. 1040; Western Union Tel. Co. v. Jackson Lumber Co., 65 So. 962; Western Union Tel. Co. v. Commercial Milling Co., 218 U. S. 406, 420.]

The telegram being from a point in Kansas to a point in Missouri was an interstate message, and its transmission was an act of interstate commerce. [Western Union Tel. Co. v. Texas, 105 U. S. 460; Western Union Tel. Co. v. Pendleton, 122 U. S. 347.] Section 7 of the Act of Congress of June 18, 1910 (36 Stats. L. 544; Fed. Stats. Ann. 1912, Vol. 1., p. 111), amending section 1 of the original Interstate Commerce Act (24 Stats. L. 379; 3 Fed. Stats. Ann. 809), as amended by the Act of June 29, 1906 (34 Stats. L. 584; Fed. Stats. Ann. 1909, Supp., p. 255), known as the "Hepburn Act" with the "Carmack Amendment" thereto, declares that telegraph companies engaged in sending messages from one State to another State "shall be considered and held to be common carriers within the meaning and purpose of this Act," i. e. within the meaning and purpose of the entire Interstate Commerce Law as it then existed. Being, therefore, a common carrier within the meaning of the Interstate Commerce Statutes, and engaged in inter-

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state commerce with respect to the particular message in controversy, the defendant telegraph company is subject to and governed by the Federal law as expounded and applied by the Federal Courts to the exclusion of all State laws and decisions. Undoubtedly, it is well established that the *liability* of common carriers *of property,* for any violation of their public duty in interstate shipments or carriage, is governed wholly by the Federal statutes relating thereto and by the rules of decision observed by the Federal courts in construing such statutes and in applying the general principles of law to the questions of liability. This has been decided so frequently of late years that it is hardly necessary to cite even a few of the many cases announcing that doctrine. [Adams Express Company v. Croninger, 226 U. S. 491; Missouri etc. R. Co. v. Harriman, 227 U. S. 657; Boston and Maine R. Co. v Hooker, 233 U. S. 97; Hamilton v. Chicago, etc., R. Co., 177 Mo. App. 145; Kent v. Chicago, etc., R. Co., 189 Mo. App. 424.] But plaintiff contends that Congress has not legislated upon the subject of the liability of telegraph companies nor upon the measure of damages governing in a suit in tort, and that, therefore, such matters are not controlled by Federal legislation and rules of decision. It is true, the Carmack Amendment to the Hepburn Act dealt with the liability of common carriers transporting property. And it is also true that section 6 of the Commerce Act, *requiring* common carriers subject to the provisions of said act to file with the Interstate Commerce Commission schedules of its rates, fares and charges for the transportation of passengers and property, is held not to apply to telegraph companies. [25 An. Rep. 1. C. C. 1911, p. 5; Conf. Rul. No. 305.] But sections 1, 3, 15 and 20 of the Interstate Commerce Law do apply to such companies. Section 1, as stated before, makes the Act applicable to telegraph companies engaged in transmitting messages from one State to another; and requires that all charges for services rendered shall be just and reasonable, and all unjust and unreasonable charges are declared to be unlawful; and it further provides that messages "may

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be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as are just and reasonable, and different rates may be charged for the different classes of messages." Section 3 provides for uniformity of charges for the different classes of service by making it unlawful to give preferences or advantages in any respect whatsoever. Section 20 provides that upon complaint being made to the Interstate Commerce Commission that any rate or classification, regulation or practice whatsoever of common carriers subject to the Act, including telegraph companies, the Commission shall have power to declare what rate, or practice, or regulation is reasonable and to forbid those found to be unjust, and to require the companies to adopt the one prescribed. Section 20 also covers the matter of making reports and keeping accounts. The Commerce Commission in its 24th An. Rep., p. 32 says: "The administration of the twentieth section of the Act to regulate commerce, so far as telegraph companies are concerned, gives rise to no very serious difficulty."

It is, therefore, apparent that the Interstate Commerce statutes clearly bring interstate telegraph companies within the terms and subject to all the provisions of the Interstate Commerce Law so far as applicable thereto; and that such companies are allowed the privilege of making its rates, classifications and charges subject to the power of the Interstate Commerce Commission to revise them upon complaint, and subject to the law's requirement that they shall be *reasonable and uniform* for the same service and classification. ([White & Co. v. Western Union Tel. Co., 1. C. C. Rep. 500.] Which was duly offered in evidence and is shown in the abstract.) So that the above named Federal laws constitute an assertion of the power of Congress over the subject of interstate telegrams and the duties of companies engaged in transmitting them. And this assertion of power over them expressly provides for uniformity of rate, of classification, and of service; and necessarily of responsibility therefor. In so doing, state action and rules are excluded. These principles are clearly an-

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nounced in and deducible from the cases of Atchison etc. R. Co. v. Dettleboch, 239 U. S. 588; Southern Ry. Co. v. v. Prescott, 240 U. S. 632. [See, also, Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492; Cleveland, etc., R. Co v Dettleboch, 239 U. S. 588; Southern Ry. Co. v Reid, 222 U. S. 411. From all of which it follows that the rule of decision heretofore in force in this State respecting the force and effect of provisions in the contract by which a message is transmitted are no longer controlling with respect to interstate messages. They are to be given the effect accorded them by the Federal laws and decisions. [Gardner v. Western Union Tel. Co., 231 U. S. 405; Western Union Tel. Co. v. Brown, 234 U. S. 542; Haskell Implement etc. Co. v. Postal Tel. etc. Co., 114 Maine 277, 96 Atl. 219; Western Union Tel. Co. v. Bank of Spencer, 156 Pac. 1175; Western Union v. Bilisoby, 116 Va. 562; Western Union Tel. Co. v. First National Bank of Berryville, 116 Va. 1009; Durre v. Western Union Tel. Co., 161 N. W. 755; Meadows v. Postal etc. Co., 91 S. E. 1009; Kirsch v. Postal Tel. Cable Co., 164 Pac. 267.]

The message, an order to buy, was changed in an important particular, and since everything surrounding the change is wholly within the knowledge of the company and it has not seen fit to throw any light upon the matter, the proof is sufficient to make out a prima-facie case of at least the "ordinary negligence" spoken of by the Federal courts, for which the stipulation on the back of the telegram limiting liability provides. [Williams v. Western Union Telegraph Co., 203 Fed. 140, 144; Jones v. Western Union Telegraph Co., 18 Fed. 717.]

Since the case is governed wholly by the Federal rules of decision, and since they uphold the validity of the stipulations set out on the back of the telegraph blank limiting liability for incorrect transmission, plaintiff's recovery must be limited by the provision applicable thereto. That provision is that the company shall not be liable for a mistake in the transmission of any unrepeated message beyond the amount received for sending the same. There is here no distinction as to whom such

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limitation shall apply, whether to sender or sendee. And while the latter is not directly a party to the contract for transmission, yet his rights are drawn from and are limited by that contract. [Gardner v. Western Union Tel. Co., 231 Fed. 405; Findley v. Western Union Tel. Co., 64 Fed. 459; Whitehill v. Western Union Tel. Co., 136 Fed. 499; Western Union Tel. Co. v. Bank of Spencer, 156 Pac. 1178; McGehee v. Western Union Tel. Co., 53 So. 205.] Nor is the question of the reasonableness or of the real purpose and effect of such a limitation open to our consideration since that is a matter for the Interstate Commerce Commission to pass upon. [Gardner v. Western Union Tel. Co., 231 Fed. 405, 409; Williams v. Western Union Tel. Co., 203 Fed. 150; Texas etc. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426; Baltimore, etc., R. Co. v. U. S. ex rel. Pitcairn Coal Co., 215 U.. S. 481; Boston and Maine R. Co. v. Hooker, 233 U. S. 97, 121; Durre v. Western Union Tel. Co., 161 N. W. 755.]

However much one may be convinced that a stipulation limiting liability to the cost of the message is not a limitation of but an absolute exemption from liability for negligence, nevertheless the case must be determined according to the rules of decision laid down by the Federal courts and they have held that such provision is not an exemption from liability. [Primrose v. Western Union Tel. Co., 154 U. S. 1, 16.] And the facts of the case with regard to the negligence shown make the provision limiting the damages to the cost of the message applicable under the Federal rule. [Haskell etc., Sec'd. Co. v. Western Union Tel. Co., 114 Maine 277; Western Union Tel. Co. v. Simpson, 117 Ark. 156; Western Union Tel. Co. v. Orr, 158 Pac. 1139; Boyce v. Western Union Tel. Co., 89 S. E. 156; Meadows v. Postal Tel. & C. Co., 91 S. E. 1009.] The contention that plaintiff should be denied even that sum for the reason that he has not asked for that specific amount, is untenable. He has asked for the enforcement of the liability to him, and has obtained more than he is entitled to. But this does not require a forfeiture of that to which he is entitled.

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The questions involved herein, or at least a number of them, are discussed and considered in an opinion by ELLISON, P. J., in the case of Jacobs v. Western Union Telegraph Company promulgated on the same date this one is. The facts, however, are different as to the character of the negligence shown and as to the protection available had the message been repeated.

If, therefore, plaintiff will, within ten days from the announcement of this opinion, enter a remittitur of such amount as will leave remaining a judgment for forty cents as of the date of its rendition, then this case is affirmed, otherwise it is reversed and remanded. All concur.

FOREST C. V. KARICOFE by W. R. A. KARICOFE, Next Friend, Appellant, v. J. O. SCHWANER, Respondent.

Kansas City Court of Appeals, June 11, 1917.

1. **UNLAWUL DETAINER: Justice Courts: Appeal: Jurisdiction.** In an unlawful detainer suit the justice court has exclusive original jurisdiction and unless an appeal therefrom is applied for within the time allowed by statute, no jurisdiction over that case is acquired by the circuit court. Nor, in such case, will the appearance in the circuit court of the opposite party confer jurisdiction.

2. ———: ———: ———: ———: **Evidence: Term of Court; Judicial Notice.** If the judgment of the justice in an unlawful detainer suit be rendered during the term of the circuit court, the appeal is returnable within six days after rendition of judgment; and no appeal can be allowed unless the same be applied for and an affidavit and recognizance filed with the justice before the return day of the appeal. If the judgment of the justice be rendered during the vacation of the circuit court the first day of the next term is the return day. The court of appeals can take judicial notice of the beginning of a term of the circuit court but not of the end.

3. ———: ———: ———: ———: ———: ———: ———: **Judgment: Collateral Attack.** Where the power of the circuit court to pass upon a particular case rests solely upon a matter *in pais*, its judgment is not open to collateral attack but is valid until it is reversed by appeal or writ of error or is annulled by other direct attack. The action at bar being a suit to set aside a judgment of the circuit court rendered at a former term, cannot be sustained

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on the ground that the appeal from the justice was not taken in time, as the circuit court tried the case as if a fact existed which made the appeal properly and timely taken, and there is nothing on the face of the record to show to the contrary. In such case it will be presumed that the court found that such fact or matter *in pais* existed. If the court erred in such finding, the remedy to correct that error is the same as when other erroneous decisions are made.

4. ———: ———: ———: **Judgment: Petition for Review: Verification.** An action in the circuit court to set aside a judgment rendered at a former term cannot be treated as a petition for review as the petition was not verified.

5. ———: ———: ———: ———: **Vacation: Coram Nobis.** A writ of error *coram nobis* is to bring the court's attention to, and obtain relief from, an error as to a fact which, without negligence of the one asking for the writ, was not shown and established at the time of the trial, and will not lie to correct an error of fact he knew or should have known; and so will not lie at instance of one who took appeal from a justice to the circuit court where judgment was rendered against him, to vacate such judgment on the ground that by reason of an extraneous fact the appeal was not in time.

6. ———: ———: ———: ———: ———: ———: ———: **Appeal and Error: Review.** While a writ of error *coram nobis* will lie to open up a judgment on the ground that it was rendered against a minor, yet as the question of whether the defendant was a minor was presented and evidence *pro* and *con* heard thereon, and no findings of fact or declarations of law were asked or given, the judgment of the trial court, in the absence of any showing to the contrary, is presumed to be based on the fact that the trial court in this action found that appellant was not a minor at the time the judgment was rendered.

Appeal from Jackson Circuit Court.—*Hon. Frank G. Johnson,* Judge.

AFFIRMED.

L. N. Dempsey for appellant.

Sehree Conrad & Wendorff for respondent.

TRIMBLE, J.—This was an action, brought September 19, 1914, to set aside a judgment rendered by the circuit court of Jackson county on April 2, 1913. After a decision adverse to the petition, the case comes here by way of appeal.

To understand the nature of the judgment sought to be destroyed and the reasons appellant has for seeking

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its destruction, as well as respondent's contentions in opposition thereto, the following statement of facts is necessary:

Appellant, Karicofe, defaulted in the payment of a deed of trust he had given, and the property was duly foreclosed and sold to the respondent, Schwaner, he receiving a trustee's deed in due form. Karicofe refused to give possession of the premises, and Schwaner brought an action in unlawful detainer against him in a justice court. Summons was duly issued and served, the parties appeared, and on August 23, 1912, judgment for possession and damages was awarded. On August 29th, the sixth day after the rendition of the judgment, Karicofe filed an affidavit and bond for appeal, and on that date the justice made an order allowing an appeal to the circuit court. A transcript of the record and proceedings, together with the original papers, was filed in the circuit clerk's office on September 3, 1912.

On the 2nd of April, 1913, the case came on for trial but Karicofe did not appear. His default was noted, and thereupon the evidence for the plaintiff was heard and the circuit court rendered judgment in Schwaner's favor for possession of the premises and for damages. At the same term and on April 6, 1913, Karicofe filed a motion to set aside the judgment. Said motion set up that he, Karicofe, was born August 12, 1893, and consequently was not yet 21 years old and would not be until August 12, 1913; and the ground of said motion was that he was a minor and no guardian *ad litem* had been appointed for him either in the justice's or in the circuit court. On the hearing of this motion, evidence was offered in support thereof, and also evidence was introduced showing that in obtaining the loan secured by the deed of trust which was foreclosed, Karicofe had, on April 3, 1912, made an affidavit that he was then 21 years old, and his parents had likewise made affidavit that he was born on August 12, 1890. The court, after hearing the evidence on said motion, overruled it. Thereupon Karicofe took steps looking toward an appeal. He filed the necessary affidavit, and an appeal was allowed but it

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was never perfected. Afterwards, on September 19, 1914, as stated, he brought this separate and independent suit to set aside the judgment in unlawful detainer rendered by the circuit court.

Two grounds are relied upon as the basis of appellant's right to have the judgment annulled. *First.* That the circuit court acquired no jurisdiction over, or power to hear and determine, the unlawful detainer suit. *Second.* That at the time said court rendered judgment Karicofe was a minor, and no guardian *ad litem* having been appointed for him, the court was without power to render a judgment against him.

The first ground invokes the principle that in an unlawful detainer suit the justice court has exclusive original jurisdiction, and, unless an appeal therefrom is applied for within the time allowed by statute, no jurisdiction over that particular case is acquired by the circuit court, for the only jurisdiction it can acquire is appellate. Nor, in such case, will the appearance in the circuit court of the opposite party confer jurisdiction. [Robinson v. Walker, 45 Mo. 117; Sidwell v. Jett, 213 Mo. 601; In re grading Bledsoe Hill, 222 Mo. 604, 608.] Appellant alleges in his petition that at the time the justice rendered judgment, to-wit, on August 23, 1912, the circuit court was in session and the term continued thereafter till September 7. Under section 7705, Revised Statutes 1909, if the judgment of a justice in an unlawful detainer suit be rendered during the term of the circuit court, the appeal is returnable within six days after the rendition of the judgment. Section 7704 provides that no appeal shall be allowed unless the same be applied for and an affidavit and recognizance filed with the justice *before* the return day of the appeal. Section 7716 provides that the appellant shall cause to be filed in the circuit clerk's office a transcript of the record and proceedings, together with the original papers on or before the return day of the appeal. The justice's judgment was rendered August 23, the affidavit and recognizance were filed on the 29th and the transcript was filed in the clerk's office September 3rd. Consequently appellant as-

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serts the circuit court was without jurisdiction to try said case on appeal and render a judgment therein. If it be admitted that the justice's judgment was rendered in term time, then the appeal was not applied for in time, because although the 29th was the sixth day after the rendition of the judgment and was the return day of the appeal, yet section 7704 requires that the appeal shall be applied for, and the affidavit and bond filed, *before* the return day. [Robinson v. Walker, supra, l. c. 119.] Section 7722 provides that where the *complainant* appeals and fails to do certain enumerated things, among which is the failure to file any affidavit or recognizance within the time required by law, the appeal shall be dismissed. And section 7723 provides that where the defendant is the one who appeals, then in case of "such default" (referring to the default specified in section 7722), the judgment of the justice may be affirmed or the appeal dismissed. It would seem that, strictly speaking, the word "default" here used might refer rather to the things the defendant fails to do after the appeal is obtained and does not include the failure to obtain an appeal. In the case of Coles v. Foley, 13 Mo. App. 249, the St. Louis Court of Appeals held that since section 7725 authorized the circuit court "in case of a judgment by default" to assess the monthly value of the premises and the damages, therefore section 7723 did not limit the court to a mere affirmance or dismissal. But in that case the defendant "had taken and perfected his appeal" and afterwards failed to appear, that is, he was strictly in default. So that the case, by reason of the facts, is not an authority squarely supporting the view that the circuit court in the case at bar had jurisdiction to try the case anew, where it is asserted that the appeal was not applied for in time.

Respondent argues that inasmuch as section 7717 provides that if the appellant fails to file the transcript and papers on or before the return day of the appeal the appellee may produce them and the judgment shall be affirmed *unless* the appellant presents good cause for his default, and since the circuit court tried the case as

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if it had jurisdiction it may be presumed that the appellee, Schwaner, filed the transcript and papers and that there was good reason for Karicofe not filing them in time. If the failure to file the transcript within six days were all that appellant herein relies upon, then, under the decision of Coles v. Foley, supra, the circuit court had power to render the decision since the circuit court did precisely what the trial court there did. But the transcript was filed in time if the justice's judgment was rendered during the vacation of the circuit court, for section 7705 says that when that is the case the first day of the next term is the return day of the appeal and we can take judicial notice of the beginning of the term though not of its end. [Hadley v. Bernero, 97 Mo. App. 314.] So that the argument that the court may have proceeded under the situation provided for in section 7717 in no way meets the contention that the appeal was not applied for in time because the judgment of the justice was rendered during the term of the circuit court. Indeed, if it were *conceded* that the steps were taken as authorized under section 7717 this would be an admission, at least implied, that the justice's judgment was rendered during the term of the circuit court. Whereas, that fact is denied; and, so far from there being any presumption that the appellant did not file the transcript in time and that the appellee filed it for him, the statements in the record and pleadings of both sides are all to the contrary, with the sole exception of Karicofe's charge that the justice's judgment was rendered in term time. We are therefore of the opinion that appellant's first ground for asking that the judgment be set aside cannot be met by the suggestions of respondent thus far considered.

But it does not follow from this that appellant is entitled to succeed in his efforts to destroy the judgment. The claim that the appeal from the justice was not taken in time, rests upon the alleged existence of something outside of the record and of the judgment roll. The judgment attacked, therefore, occupies a vastly different *status* than if the alleged fact appeared upon the face

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of the record. It is a well-established rule that where the power of a court, like the circuit court, to pass upon a particular case rests solely upon a matter *in pais,* its judgment is not open to collateral attack but is valid until it is reversed by appeal or writ of error, or is annulled by other direct attack. It is not strictly accurate to say that if, by reason of an extraneous fact an appeal in an unlawful detainer suit was not taken from the justice in the time allowed by statute, then the circuit court obtained "no jurisdiction over the subject-matter." Because, strictly speaking, that phrase means the power conferred by law to hear the class of actions to which a case belongs, and the statutes give that power to the circuit court. [Hadley v. Bernero, 103 Mo. App. 549, 554.] Now the action in the case at bar is, as stated, a separate and independent suit to set aside a judgment of the circuit court rendered at a former term. It cannot be regarded as a petition for review, under section 2104, Revised Statutes, 1909, as amended by Laws 1913, page 159. It was not verified as that statute requires. It is not a petition in equity nor one asking that a judgment be set aside upon equitable grounds.

So that we are of the opinion that this is purely a *collateral* attack upon the judgment sought to be destroyed; that since the circuit court tried the case as if a fact existed which made the appeal properly and timely taken, and there is nothing on the face of the record to show to the contrary, it is presumed that the court found that such fact existed; and that, if the court erred in such finding, then the remedy to correct that error is the same as when other erroneous decisions are made. [Hadley v. Bernero, 103 Mo. App. 549, 553-560.]

Even if the petition herein could be regarded as in the nature of a petition for a writ of error *coram nobis,* yet that will not lie for the correction of an error as to such a fact as the one now under consideration, namely, that the justice's judgment was rendered during a term of the circuit court. As to such a fact, that was a

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matter which appellant should have known, and, had he been diligent, he would have brought it to the attention of the court in that case. He it was who took the appeal and, therefore, he knew that the case would be up for consideration in the circuit court at some time, and it was his business to know when the case was returnable. A writ of error *coram nobis* will not lie to correct an error of fact which the appellant knew or should have known. [Hadley v. Bernero, 103 Mo. App. 549, 562.] It is to bring the attention of the court to, and obtain relief from, an error as to a fact which, without negligence on the part of the one asking for the writ, was not shown and established at the time of the trial. [5 Am. & Eng. Ency. of Pl. & Pr., 28; Jeude v. Simms, 166 S. W. 1048,1052; State v. Stanley, 225 Mo. 525, 534.]

However, if the petition herein could be considered in the light of an application for a writ *coram nobis,* it would lie to open up the judgment on the ground that the one against whom the judgment was rendered was a minor. [Powell v. Gott, 13 Mo. 459; Jeude v. Simms, supra, 2 Tidd's Practice, 1136; Life Assn. of America v. Fassett, 102 Ill. 315.] Appellant appeared in the circuit court and filed a motion in the nature of a writ *coram nobis* on that ground and the question of his infancy was investigated but the court found that he was of age. This might perhaps produce the same result as if the question of minority had been raised in the original suit and the court had expressly found that the party against whom the case was brought was of age. In which case it would be a question whether the writ *coram nobis* would be the proper remedy, as the claimed fact of infancy in that event would not be one consistent with the record, nor would the judgment be one that would not have been rendered had the attention of the court been directed to the question of infancy. But, if the appellant was a minor at the time the motion in the original case was filed, doubtless the filing of the motion was nothing. It was the same as if he had never filed it. Hence, if the petition in the case at bar can be treated as being in the nature of an application

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for a writ *coram nobis,* it would have to be considered as if no similar motion had been filed in the original case. But in the case now before us the question of whether appellant was of age or was a minor was again presented and evidence thereon was heard *pro* and *con.* The judgment of the court, in the case at bar, was against appellant. There was evidence in the present action to justify the trial court in finding that appellant was of age at the time the judgment was rendered and at the time he filed his motion. No finding of fact or declarations of law were asked or given. The judgment of the trial court, in the absence of any showing to the contrary, may, therefore, be presumed to be based on the fact that the trial court in this action found that appellant was not a minor at the time the judgment was rendered. So that, even if we might, in a spirit of gracious liberality, treat the petition herein as an application for a writ *coram nobis* (a thing which we gravely doubt), still the appellant has not shown us that he is entitled to a reversal of the trial court's judgment in this case. Wherefore, the judgment is affirmed. The other judges concur.

W. G. TULL, Plaintiff, v. FRANK C. FLETCHER et al., Defendants, FRANK C. FLETCHER and ADARESTA T. FLETCHER, his wife, Respondents; BERKSHIRE LUMBER COMPANY, Appellant.

Kansas City Court of Appeals, June 11, 1917.

1. **MECHANIC'S LIENS: Transfer of Property: Notice.** B. while owner of the real estate contracted with a materialman for all the materials required for a residence thereon, and, in the midst of the construction thereof, conveyed the property to another. *Held,* that this did not affect the materialman's right to a lien as an original contractor even though most of the materials were delivered and built into the property after such transfer. The contract with the owner having been made and the delivery of the materials having commenced while B. was such owner, the materialman was not bound to take notice of any subsequent conveyance of the property.

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2. ———: **Materials: Lienable Items: Laundry Posts.** Where a contract provided for the furnishing of all the materials required for the construction of a residence, an item for lumber used in constructing laundry posts in the yard constitutes a lienable item, as the improvements were for the purpose of transforming the lot into a residence, the posts were a part of those improvement, and, with the house and all other appurtenances permanently erected on the lot, formed one complete and entire affair, purchased under the same contract, and the whole formed one general improvement of the property.

3. ———: ———: **Contract.** Where a contract between an owner of property and a materialman provided that the materialman is to furnish the owner all the materials he requires for the improvement of the property, the materialman is bound to deliver all that the owner orders.

Appeal from Jackson Circuit Court—*Hon. Thomas J. Seehorn,* Judge.

REVERSED AND REMANDED (*with directions.*)

Ellis, Cook & Barnett for appellant.

Ball & Ryland, for respondent.

TRIMBLE, J.—The suit out of which this appeal grew was brought as an equitable action, under sections 8235a-g (Laws 1911, p. 314), by one of several lien-claimants to determine for all parties the various rights involved in the matter of the establishment and enforcement of certain mechanic's lien-claims. The chancellor heard the case in all its ramifications and rendered a decree adjusting and disposing of the different claims. Of these, only one now remains in controversy, that of the appellant the Berkshire Lumber Company, to whom the chancellor awarded a personal judgment for the value of the lumber and materials it furnished, but denied a lien therefor.

Before rendering his decree the chancellor made a finding of facts. And in the statement of the case which we hereinafter make, only such facts are stated as were found by him or which are conceded in the evidence of both sides to the appeal.

On June 6, 1913, Clarence L. Brown became the owner of Lot 48 in Bowling Green an addition to Kansas City, otherwise known by its street number as 26 East 56th Street Terrace. While still the owner there-

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of, and sometime previous to June 24, 1913, he contracted with the Berkshire Lumber Company, the appellant, to furnish and sell to him "all the lumber which said Brown should require in the erection and installation of improvements which said Brown was then beginning upon the said property." These improvements were for the erection of a dwelling on said lot and the making of the same into a place of residence.

Pursuant to said contract, appellant on June 24, 1913, began delivering upon the property the lumber and materials for which the lien now in question is sought, and Brown commenced the improvements. Thereafter, and while the improvements were in the course of erection, Brown, on July 1, 1913, by warranty deed transferred the lot to the Fletchers, the respondents herein. This deed was made pursuant to a contract Brown had with the Fletchers to transfer said lot to them and to erect thereon a residence with appurtenances for a stipulated sum which was to include the purchase price of said lot. This contract was dated June 12, 1913, and may have been in existence at the time Brown contracted with the Lumber Company for the materials, but said company had no notice nor knowledge of the Fletcher contract until at the trial of this cause in November, 1915.

After deeding the property to the Fletchers, which deed was recorded July 3, 1913, but which contained no reference to the contract of June 12th, Brown continued making the improvements on said lot; and appellant, from time to time as ordered, delivered on said property the materials therefor under the contract it had with Brown to furnish *all that he should require* for that property. Said materials, so furnished and delivered, were all built into the permanent improvements on said property and were all charged in one running account against Brown for that lot.

The first item in the account was dated June 24, 1913, and the last item was dated November 4, 1913. The item next before the last was dated September 29, 1913. The lien-claim was filed April 8, 1914. Conse-

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quently, if the item of November 4th can be properly included in the account as lienable, then the lien-claim was filed within the six months given by section 8217, R. S. 1909, to an original contractor in which to file his claim for lien. But if the item of September 29th must be taken as the end of the lienable account then the lien-claim was not filed within six months thereof. On the theory that the item of November 4th should not be considered, and that the account must be deemed to have accrued on September 29th, the chancellor denied the lien because the lien-claim was not filed within six months of that time. This is the only matter affecting appellant's right to a lien. In all other respects the requirements of the statute for the establishment of a lien by an original contractor were complied with. The theory upon which the court decided that the item of November 4th could not be considered as the end of the lien account will be stated later.

It will be observed that Brown, while owner of the real estate, contracted with appellant to furnish *all the materials he should require* for the residence he was creating on said lot and that in the midst of the construction thereof he conveyed the property to the Fletchers. This does not affect appellant's right to a lien as an original contractor, even though most of the materials were delivered and built into the property after such transfer. [McAdow v. Sturtevant, 41 Mo. App. 220, 227; Williams v. Chicago etc. R. Co., 112 Mo. 463, 501; Hammond v. Darlington, 109 Mo. App. 333, 343; Miller v. Barroll, 14 Md. 173; Wagenstein v. Jones, 65 N. W. 717; Jeffersonville Water Supply Co. v. Ritter, 138 Ind. 170; Green v. Williams, 92 Tenn. 220; Gale v. Blaikie, 126 Mass. 274; McNeal etc. Co. v. Howland, 111 N. C. 615; 27 Cyc. 218.] And appellant having contracted with Brown, the owner, and the furnishing of the materials and the constructing of the improvements having commenced while he was such owner, appellant was not bound to take notice of any subsequent conveyance of the property. [Fourth Avenue Baptist Church v. Schreiner, 88 Pa. St. 124.] And as appellant had no

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notice nor knowledge of Brown's contract with the Fletchers until long after all rights had accrued and become fixed, the question of appellant's right to a lien must be considered *throughout* on the basis of appellant being an *original contractor* dealing with the *owner* of the property. This feature must not be lost sight of and is important, as will more clearly appear later on. Under the circumstances of this case, there never was a time when the Fletchers, the subsequent owners of the property, were entitled to have appellant's right to a lien considered on the theory that, as to the last item of said account, Brown was a contractor and not an owner of the property.

The last item of said account was two pieces of 4 inch by 4 inch cypress, 14 feet long, set in concrete on the rear of said property as laundry posts and permanently affixed as an improvement of the same. Brown was a builder of many houses and it was his practice to erect, as a part of his improvement in building a house, laundry posts in the yard. The specifications for the improvements, in the contract the Fletchers had with Brown did not mention laundry posts, but Mrs. Fletcher says in her testimony that she talked about them when the house was being planned. When the Fletchers moved into the house on November 3, 1913, they noticed that there were no laundry posts installed. Mr. Fletcher then told his wife she had better request Mr. Merchen, Brown's carpenter foreman, to secure them. Mrs. Fletcher then inquired of Mr. Wagner, Brown's superintendent, if Mr. Brown would put them in and he told her that Mr. Brown would as it was usual for him to do so with all his customers. Wagner then reported Mrs. Fletcher's request to Mr. Brown and was instructed by said Brown to put them in. Wagner then ordered the lumber for said posts of the appellant and they were delivered on the property November 4, 1913, and the same, as two pieces of select cypress, were charged to Brown's account for said property. And they were then permanently affixed as an improvement on the property as hereinbefore stated. At this time

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Brown had not completed the improvement of the property under his contract with the Fletchers and did not finish until Thanksgiving Day, November 27, at which time he finished sodding the yard. The last carpenter work on the house itself was done October 31st, but the court found that Brown did not complete the improvements on the property under his contract with the Fletchers until long after said posts were erected.

The improvements were for the purpose of transforming the lot into a residence. The laundry posts were a part of those improvements, and, with the house and all other appurtenances thereto, formed one entire and complete affair. The laundry posts were permanently erected on the lot and became a convenient and useful adjunct to the property as a family residence, the purpose for which it was intended. The lumber for the posts was purchased under the contract *between appellant and Brown* by which all the other materials were bought. In other words, the lumber used in these posts and the lumber used in the house were all bought under one and the same *entire* contract, and the whole formed one general improvement of the property. The last item therefore cannot be eliminated from the account on the ground that it is not lienable because it went to construct the laundry posts. Under the circumstances just stated they constitute a lienable item. [Dugan Cut Stone Co. v. Gray, 114 Mo. 497, 500; Henry v. Platt, 84 Mo. 237, 241.] The respondents do not contend that laundry posts, purchased and constructed under circumstances such as are above enumerated, are not lienable improvements, nor did the trial court deny the lien upon that ground. The lien was denied upon the ground that in Brown's contract *with the Fletchers* there was no requirements for laundry posts and that Brown's subsequent consent to erect them was a mere gratuity on his part, and for this reason the last item in the account cannot be considered as any part of the *original contract* and hence said item of November 4 cannot be treated as the last item of the lien account. The court gave a declaration of law to this effect. But

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it does not at all follow that because Brown was not required by his contract with the *Fletchers* to erect laundry posts, therefore he did not purchase the lumber under the contract he had with *appellant to sell him all that he should require* for the improvement of the lot. Indeed it is unquestioned, from the facts found by the chancellor, that the lumber for the posts was purchased by Brown, and sold and furnished by appellant, under the same contract *between them* as the rest of the materials were. The "original contract" governing appellant's right to a lien, in the circumstances of this case, is the contract between appellant and Brown, not Brown's contract with the Fletchers. Appellant had nothing to do with that and knew nothing of it. The contract which formed the foundation for a lien in this case, and which fixed the status of the parties with reference thereto, was the contract between Brown and appellant. This, as intimated above, was the contract which, throughout all the transactions that followed, fixed the status of appellant as an *original contractor* dealing with the *owner*. The Fletcher's subsequent acquiring of the title to the lot did not change matters. They knew that Brown was constructing the improvements when they got the lot from him. They knew that appellant was furnishing materials for said improvements and they allowed appellant to continue to furnish same without notice or knowledge of any contract they had with Brown. They took the lot under these circumstances *cum onere,* with the status of original contractor and owner *fixed* between appellant and Brown, and out of which, upon compliance with the necessary statutory requirements, a lien would necessarily evolve. Not only did the Fletchers allow appellant, without notice, to continue furnishing materials, including said last item for the posts, but they were the persons who had Brown to put up said posts. Under all these circumstances, appellant's right to a lien continued just the same as if there had been no transfer of the property to the Fletchers; and they are estopped to assert, as against appellant, that Brown was a contractor and not an

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owner, even as to the item of November 4th; and they would also be estopped to deny that the posts were a part of the one general improvement of the property if in point of fact they were not. [Allen v. Sales, 56 Mo. 28, 37; United States Water Co. v. Sunny Slope Realty Co., 152 Mo. App. 300; Fire Extinguisher Co. v. Farmer's Elevator Co., 165 Mo. 171, 303; Weber v. Weatherby, 34 Maryland 656; Buckstaff v. Dunbar, 15 Neb. 115; Schultze v. Alamo Ice etc. Co., 21 S. W. 160.] Appellant, under its contract with Brown to furnish all the materials he required for the improvement of that property, was bound to deliver all that Brown ordered. [35 Cyc. 207; Laclede Construction Co. v. Moss Tie Co., 185 Mo. 25; Laclede Construction Co. v. Tudor Iron Works, 169 Mo. 137.] The Fletchers noticed the absence of laundry posts and asked to have them put in and Brown ordered the lumber from appellant and put the posts in before the improvement of the property had been completed by him. So far as appellant is concerned, and so far as its contract with Brown is concerned, there was nothing to show this last item was any different from any other item. It would seem that all these facts would estop the Fletchers from claiming anything to the contrary. However, as stated, the facts found by the trial court show that the last item was bought and furnished under the same contract with appellant as was the other materials and that they all went to make one general improvement as the whole. Hence we are of the opinion that appellant ought not to be denied a lien. The contract which fixes and determines the status of the parties with reference to the lien, and which is to be regarded as the contract furnishing the foundation thereof, is the one between Brown and appellant. The latter had nothing to do with Brown's contract with the Fletchers, and appellant's rights should not be affected by it since appellant had no notice of it. The fact that there was a lapse of time between the last item and the one next to the last does not change the matter. [Badger Lumber Co. v. Lyons Ice & Power Co., 174 Mo. App. 414; Darlington Lumber Co. v. Smith Bldg. Co., 134 Mo.

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App. 316.] Nor do the circumstances under which Brown ordered the lumber in the last item make it the subject of a contract other than the one under which appellant sold the other materials. [St. Louis Fire, etc., Works v. Viviano, 185 S. W. 218, 220; Bruns v. Braun, 35 Mo. 337; Badger Lumber Co. v. Lyons Ice etc. Co., supra.] There was no definite or specified bill of lumber agreed upon in the contract appellant had with Brown. That contract was not made with reference to any specifications which the Fletchers had with Brown nor with reference to any contract whatever with the Fletchers. If Brown had remained the owner of the property he could not successfully claim that appellant should be denied a lien; and under the facts of this case the Fletchers are in no better position to contest a lien than he.

For these reasons we are of the opinion that the judgment denying appellant's lien should be reversed and the cause remanded with directions to decree a lien in accordance herewith. It is so ordered. All concur.

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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1916.

L. H. WESSEL, Respondent v. WILLIAM WALTKE & COMPANY, Appellant.

St. Louis Court of Appeals, December 30, 1916.

1. **RELEASES: Rescission: Statute.** Although section 1812, R. S. 1909, providing that when a release is pleaded in bar, the reply may allege facts showing fraud, etc., in its procurement, has changed the prior rule that a release could be set aside only in equity, nevertheless it was not intended to thereby change the rules governing the rescission of contracts of settlement, for fraud.
2. ———: ———: **Necessity of Tender: Pleading.** Where a release, pleaded as a defense in an action at law for personal injuries, is attacked by the reply for mistake and false representations, pursuant to Sec. 1812, R. S. 1909, plaintiff is bound to aver in the reply, and to prove, a tender, before suit brought, of the amount received and interest, or, in lieu thereof, to plead and prove facts showing that the amount would not have been accepted if tendered, and, therefore, that the tender would have been a useless act.
3. ———: ———: ———: ———: **Waiver of Tender.** In an action for personal injuries, where plaintiff sought to avoid a release pleaded in the answer, the fact that defendant insisted on the conclusiveness of the settlement and release was not, of itself, evidence upon which to base a claim that a tender of the consideration, before suit was brought, would have been refused and, therefore, that it was unnecessary to make the tender.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillan,* Judge.

REVERSED.

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Percy Werner and *Leigh C. Turner* for appellant.

(1) The reply does not state facts sufficient to constitute an avoidance of, or defense to, the covenant not to sue which is set up in the answer, and the trial court erred in refusing to sustain objection to the introduction of any evidence in the case and in refusing to direct a verdict for the defendant. Mallinckrodt Chemical Works v. Nemnich, 169 Mo. 388. (2) The failure of the plaintiff to disaffirm or repudiate the covenant not to sue, and to tender the amount received thereunder, prior to the institution of the suit, bars recovery therein. Reid v. St. Louis & S. F. R. Co., 187 S. W. 15; Retzer v. Dold Packing Co., 58 App. 264; Jarrett v. Morton, 44 Mo. 275; Estes v. Reynolds, 75 Mo. 163; Girard v. St. Louis Car Wheel Co., 123 Mo. 358; Och v. Railroad, 130 Mo. 27; Putnam v. Boyer, 173 Mo. 398; Althoff v. Transit Co., 204 Mo. 166, 171; Morgan County Coal Co. v. Halderman, 254 Mo. 596, 650; Carroll v. United Ry's Co., 157 Mo. App. 247; Whitewell v. Aurora, 139 Mo. App. 597; Lomax v. Electric R. Co., 119 Mo. App. 192; State ex rel v. Stuart, 111 Mo. App. 478, 493; Hancock v. Blackwell, 139 Mo. 440, 453. (3) There was no allegation or evidence of any fraudulent misrepresentation of facts which would warrant any court in setting aside, or allowing a jury to override, the covenant not to sue presented as a defense to this action. The mere expression of an opinion is no ground for setting aside any instrument, whether the opinion is correct or not. Magnuson v. Casualty Co., 125 Mo. App. 206; Carroll v. United R'ys Co., 157 Mo. App. 249. When the instrument admittedly contains what plaintiff understood substantially he was asked to agree to, it is immaterial that he failed to read it or have it read to him, or that he did not "fully understand" its contents. Reid v. St. Louis & S. F. R. Co., supra. (4) On plaintiff's own admissions and the uncontradicted facts in evidence, plaintiff affirmed his contract not to sue and cannot now be heard to repudiate it. (5) The release or covenant not to sue was procured by an officer of the court, to-wit, a reputable member of the bar of the city of St. Louis

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and acting as such. There is no evidence here which would warrant a court in submitting to a jury whether in his attempt to "purchase peace" for the defendant, he was guilty of fraud.

Fish & Fish and *Crigler & Frank* for respondents.

(1) When a release or purchase of peace has been obtained by guile, deceit, force or fraud, the tender of the sum obtained thereby is not required if it appears, either by the pleading or by the proof, that it would be useless or not accepted. Carroll v. United Railways Co., 157 Mo. App. 293-294; Girard v. St. Louis Car Co., 46 Mo. App. 79; Girard v. St. Louis Car Co., 123 Mo. 358; Reid v. St. L. & S. F. R. R. (Sup. Ct.), 187 S. W. 17; Deichman v. Deichman. 49 Mo. 107; Tenant v. Ins. Co., 133 Mo. App. 356-357; Westlake v. St. Louis, 77 Mo. 47; Walker v. Cooper, 97 Mo. App. 441; Woods v. Wickstrom (1913), 67 Ore. 581, 135 Pac. 192; Malkmus v. Cement Co., 150 Mo. 456; Putnam v. Boyer, 173 Mo. App. 400; 2 Black on Rescission and Cancellation (1916 Ed.), sec. 396. (2) One's acts and conduct may show fraud as well as misrepresentation, taking into account the unequal position of the parties. Stonemetz v. Head, 248 Mo. 243; Porter v. United Railways Co., 165 Mo. App. 619; Kendrick v. Ryus, 225 Mo. 150; Howard v. Scott, 225 Mo. 712; Judd v. Walker, 215 Mo. 312; Lanson v. Stock Exchange, 200 Mass. 367, 86 N. E. 940; Connor v. Chemical Co. (N. J.), 17 Atlantic 975; Union Pacific Ry. Co. v. Whitney, 198 Fed. 784, 117 C. C. A. 392; Logan v. United Ry. Co., 166 Mo. App. 490; Lusted v. C. & N. W. Ry. Co., 71 Wis. 391, 36 N. W. 857; C. R. & P. Ry. Co. v. Lewis, 109 Ill. 120; Woods v. Wickstrom, 67 Ore. 581, 135 Pac. 192; 2 Black on Rescission and Cancellation, (1916 Ed.), secs. 382-386-388; Wingfield v. Railroad, 257 Mo. 347; Koffman v. Railroad, 95 Mo. App. 459. (3) Whether or not the release was fairly obtained, is for the jury, and its finding is not open to review. Logan v. United Rys. Co., 166 Mo. App. 490. Where the appellant is not entitled to judgment, in any event, the case will not be reversed for error occurring

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during the trial, the judgment being for the right party, regardless of the error, the material rights of the appellant not being affected. Putnam v. Boyer, 173 Mo. App. 401; Carroll v. United Rys. Co., 157 Mo. App. 294; Cross v. Gould, 131 Mo. App. 593; Logan v. Field, 192 Mo. 70; Peterson v. The Transit Co., 199 Mo. 331; Revised Statutes of Mo., 1909, sec. 2082.

THOMPSON, J.—This was an action for personal injuries. Plaintiff secured a verdict and judgment in the lower court, defendant filed motion for new trial, which was overruled, and it appeals to this court.

On the 24th day of February, 1913, plaintiff was in the employ of defendant company and while ascending a stairway on that day was injured by being struck on the head by the falling of a trap door which rested on hinges and was suspended over the stairway which ran from the basement to the first floor of the establishment in which he was employed. He was knocked to the floor by the door, rendered unconscious for some time, was removed to his boarding house a few blocks away and was laid up about five weeks. At the end of March, 1913, he returned to his former employment and continued to work there continually until the latter part of July or the first part of August, at which time he left the employment of the defendant after some difficulty with the defendant's superintendent, and thereafter, upon requesting a recommendation from defendant's superintendent, it was refused, and this suit was filed on the 8th day of September, 1913.

The evidence tended to show that during the summer of 1912 the defendant's building in which a soap factory was conducted was destroyed by fire and was rebuilt during the fall, and was not entirely completed in all its details on February 24, 1913, the date of this accident. The evidence showed that the defendant had contracted with a firm by the name of Mesker Brothers to construct and install an iron safety and trap door over the stairway in question, and that firm did construct the door and install it in position by means of

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hinges attached to the floor and a rope and weight with which it was raised and lowered over the trap door through which one ascended and descended in passing from one floor to another. At the time of the accident this door fell as plaintiff was ascending the stairs because of the fact that the rope which held it suspended over the staircase broke. This rope was furnished by Mesker Brothers and the evidence tended to show that at the time the door fell Mesker Brothers had not entirely completed its work for the installation of said trap door, and that the work had not been accepted or paid for by defendant company at the time of the accident. Plaintiff was paid his wages during the time he was unable to work, and his doctor bill was also paid.

The petition claims damages from the defendant for the injuries sustained by the falling of the door upon the plaintiff's head. The defendant's answer consisted, first of a general denial of liability, and second it sets forth a covenant not to sue, signed and acknowledged by the plaintiff, wherein for a consideration of $15 the plaintiff agreed not to bring suit against this defendant. This covenant not to sue was signed on the 28th day of February, 1913, under circumstances which will be detailed hereinafter. The plaintiff's reply to the answer was as follows:

"Comes now the plaintiff in the above entitled cause, and for his reply to defendant's answer states that within a few days after he was injured, as set out in his petition, and while he was confined to his room on account of the said injuries, and while he was in no condition of body and mind to make any contract or to realize what he was doing, and while he was suffering great physical pain and mental anguish, he was visited by a man who said he was the attorney representing Wm. Waltke & Company, the present defendant. Plaintiff further states that this man told him that he had no cause of action against Wm. Waltke & Company, but that plaintiff did have a good cause of action against the company that constructed the said trap-door which caused the injury, and that as plaintiff had no cause of

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action against Wm. Waltke & Company, this man told the plaintiff that he would give him some money for medicine and other expenses until he could get well and that then the plaintiff could sue the aforesaid construction company for damages for the injuries received by him.

"Plaintiff states that he did not know this man and had never seen him before, and did not realize what he was doing, and that this man handed him fifteen dollars and got him to sign some paper, but did not read the same to him, nor was plaintiff permitted to read the same if he had been able to do so, nor did he leave plaintiff a copy of said paper.

"Plaintiff further states that the paper which he signed may be the one that the defendant mentions and sets up in its answer, but of this plaintiff is not fully advised for the reason that no copy of said paper was left with him, and he has not seen the said paper, it having not been filed with the said answer in this cause.

"Plaintiff further states that he signed the said paper relying on the statements of the aforesaid attorney, as far as he was able to realize its meaning, and believing that the said statements were true, as represented by the said attorney, but that the said statements made by the said attorney were false and fraudulent, and were known to be such by the said attorney at the time that he made them, and that they were made by the said attorney when this plaintiff was in no condition of body and mind to contract in regard to his aforesaid injuries, and that this fact was well known to this attorney, and that his said signature was obtained to the said instrument by false and fraudulent statements and representations, made by an attorney skilled in his profession, and who knew at the time that he was taking advantage of this plaintiff, whom he knew to be racked by suffering and pain and to be in no condition to make a contract at that time relative to his injuries. Plaintiff further states that the alleged covenant not to sue, now supposed to be set forth in the defendant's answer, was wholly without any consideration; was obtain-

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ed by false and fraudulent statements and representations made by the attorney for defendants as above set forth; and that said instrument was executed without any consideration and is therefore absolutely null and void.

"Plaintiff further states that he stands ready now and has always been willing to refund to the said defendants the sum of fifteen dollars, which it is alleged was given to him, and he herein agrees that the same may be deducted from any judgment or finding in his favor, if any.

"WHEREFORE, plaintiff prays that the said alleged covenant not to sue, set forth in defendant's answer, being without consideration, may be held for naught, and set aside, and that all of defendant's answer except paragraph one thereof, be set aside and constitute no defense, and that he may have judgment as prayed for in his petition."

It appears from the evidence that on the 28th day of February, 1913, a young lawyer, representing the defendant company, went to the boarding place of plaintiff, together with the doctor who was treating the plaintiff. The doctor lived in the neighborhood, had a good reputation and was present at the time the covenant was executed. With reference thereto, the plaintiff testified that his signature was attached to it, that he could read and write and remembered that the doctor and young lawyer were present when he signed it, that the young lawyer was speaking about his having a claim against Mesker Brothers and that after he got out he consulted Mr. A. R. Taylor about his claim against Mesker Brothers; that the young lawyer had recommended Mr. A. R. Taylor; that at the time he signed the paper he had bad spells and did not know where he was at times; was unbalanced and a sick man and that his boarding-house keeper kept cold towels on his head; that when the paper was signed, as much as he recollected about it, he thought the $15 was given to him as a little money with which to buy things, that he signed the paper and did not read it and it was not read to him, and that he really

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did not know what it was for as he was in such pain and misery, that his landlady was not there at the time, that he gave her the $15, and he found it on the bed the next morning and didn't know where it came from, and on cross-examination he said, as far as he could recollect, the young lawyer stated that he should accept the $15 and that he could not bring suit against the defendant company, that he could help him and would get him a lawyer who would bring suit for him against the people who were putting up that work, and then he signed the paper, and that is all he stated according to his best recollection, and that the doctor was there at the time.

The young lawyer testified that he was a graduate of the University of Missouri and had been practising law for three years and a representative of an insurance company, and was acting for the defendant in negotiating with the plaintiff, and that before seeing the plaintiff he communicated with the plaintiff's doctor and ascertained from him that the plaintiff was perfectly normal mentally and could be seen on business, and that he went and took the doctor with him to see the plaintiff. That the plaintiff said he was all right and was getting along pretty well. That he thereupon informed the plaintiff that he had made investigation of the facts connected with the accident, and that he had come to the conclusion that the defendant company was not responsible to plaintiff for the injuries, but that the independent contractor, Mesker Brothers, who were installing the door, were responsible to the plaintiff, but that he wanted to buy defendant's peace and was willing to pay him $15 for a covenant not to sue defendant and would otherwise help him out and the plaintiff said that was satisfactory to him, as he did not want to sue the defendant anyhow, as it had always treated him properly, that he then read carefully over to the plaintiff the covenant not to sue, and plaintiff said he was perfectly willing to sign it and that he had plaintiff's doctor, who was present at the time, witness the instrument. The testimony of the young attorney was full and frank, and to the effect that the plaintiff knew all about what he was doing, and

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he signed the instrument after a complete explanation of what it contained, and that at the time he was normal and perfectly able to understand the agreement he was making.

The doctor testified that he was present at the time the covenant not to sue was signed, that he saw the plaintiff sign it, and that he was entirely rational at the time and that the paper was read and explained to him, that he does not know whether the plaintiff read the paper or not, but he does know that the young attorney read it to him and plaintiff had the opportunity to read it himself, and that the paper was acknowledged in his presence.

It appears that in the latter part of March the plaintiff resumed work at defendant's plant. It also appears that he employed Mr. Fish as his attorney, and that he presented a claim against the independent contractor, Mesker Brothers, and for some time carried on negotiations with representatives of Mesker Brothers in an attempt to settle his claim against Mesker Brothers; that propositions were made by the plaintiff to Mesker Brothers and by Mesker Brothers to the plaintiff, but for some reason the parties were unable to agree. These negotiations were carried on for some considerable time. It further appears in the evidence that after the covenant not to sue was signed by the plaintiff, he told the young lawyer, referred to above, that he was confident that he had a good case against Mesker Brothers and was going after them, and asked him to refer him to a lawyer. The attorney for Mesker Brothers further testified that in the month of May or June the plaintiff informed him that he had made a settlement with the defendant company for $15 and that he had made the settlement because he did not want to sue the defendant and further testified:

"He said he had released them because he could sue Mesker Brothers and I said Mesker Brothers were willing to pay any reasonable amount in settlement of the claim against them. Mr. Fish had made a very reasonable proposition."

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The evidence further showed that after the plaintiff went back to work he submitted to a medical examination at the hands of a doctor representing Mesker Brothers and he told one F. D. Bryan, a fellow workman, that he had "fixed up" the matter of his claim against the defendant. He further told the credit manager of the defendant company that he had signed a paper or contract with the defendant company releasing them from liability. He told his superintendent that he had released the defendant company by a contract, and to practically all of these people he made the statement that he was pressing his claim against the independent contractor, Mesker Brothers.

At the close of the plaintiff's case and again at the close of the whole case, the defendant asked for an instruction directing the jury to return a verdict in favor of the defendant under the pleadings and evidence, which the court refused to give.

The appellant contends that the reply is insufficient, and that the verdict should have been in favor of the defendant under the pleadings and evidence in this case, because of the fact that the reply and evidence do not show that before the suit was instituted there was a tender of the $15 and interest paid by the defendant to plaintiff as a consideration for the covenant not to sue. At the outset of the case plaintiff tendered to the defendant in the presence of the jury the $15 but without the interest. This tender was objected to by the defendant, and at the same time the defendant strenuously objected to the introduction of any evidence in the case on the ground that no tender had been made before the suit was instituted, and asked for judgment because the reply was insufficient. The objection was overruled, and defendant refused in open court to accept the tender for the reasons stated in the objection. We are, therefore, concerned with the point in this case as to whether or not it was necessary for the plaintiff to tender the $15 and the interest before instituting this suit.

In section 1812, Revised Statutes 1909, it is provided that whenever a release, composition, settlement or other

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discharge of the cause of action sued on shall be set up or pleaded in the answer in bar to plaintiff's cause of action sued on, it shall be permissible in the reply to allege any facts showing or tending to show that said release, composition, settlement or other discharge was fraudulently or wrongfully procured from the plaintiff, and that the issues thus raised shall be submitted to the jury with all other issues in the case. Prior to the enactment of this section, it was held that the release must be set aside in equity, but the statute has changed this, making it lawful to attack a release or discharge by reply in an action at law. [Carroll v. United Railways Company, 157 Mo. App. 247, l. c. 289, 137 S. W. 303; Althoff v. St. Louis Transit Company, 204 Mo. 166, 102 S. W. 642; State ex rel. v. Stuart, 111 Mo. App. 478, 86 S. W. 471.] But it was not meant by the statute to change the rules governing the rescission of contracts of settlement upon the ground of fraud, as was clearly pointed out in the case of Althoff v. St. Louis Transit Company, 204 Mo. 166, l. c. 171, 102 S. W. 642, where it is said:

"It was not the purpose of the Legislature, by the enactment of that section, to change the law of accord and satisfaction, and the rules governing the rescission of contracts of settlement upon the grounds of fraud, but the clear intention was to avoid a multiplicity of suits, by authorizing the fraud issue to be tried by the jury at the same time and in the same case involving the original cause of action."

One of the earliest cases upon the subject is that of Jarrett v. Morton, 44 Mo. 275, Where BLISS, J., speaking for the court said:

"Before commencing proceedings on his original claim, the plaintiff should have tendered back the note received of defendant—should have repudiated the settlement—and then he would have been at liberty to impeach it if set up against his claim. But, as it is, he hangs on to it, and is not at liberty to deny its validity."

The old case of Estes v. Reynolds, 75 Mo. 563, l. c. 565, was a case to set aside or disaffirm a contract for fraud, and the court in that case said:

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"A party cannot affirm a contract in part, and repudiate it in part. He cannot accept its benefits on the one hand, while he shirks its disadvantages on the other. He cannot play fast and loose in the matter. Nor is he permitted to select his own time, consult his own convenience and watch the rise and fall of the market, before exercising the right of rescission. If he elects to disaffirm the contract in consequence of deception practiced upon him, such election in order to avail him must have the chief and essential element of promptitude, and he must put the other party in the same situation as he was before the contract was made. All the authorities speak this language. [Jarrett v. Morton, 44 Mo. 275; Hart v. Handlin, 43 Mo. 171, and cases cited.]"

In the case of Retzer v. Dold Packing Company, 58 Mo. App. 264, the Kansas City Court of Appeals said:

"If the contract was voidable for any cause the plaintiff had the right to elect to affirm or disaffirm it. If he affirmed and the defendant failed to perform it in any particular his remedy would be on the agreement, but if he chose to disaffirm it and prosecute his original cause of action he must first make restitution of the consideration received under the repudiated contract."

In the case of Carroll v. United Railways Company, 157 Mo. App. 247, 137 S. W. 303, this court, reviewing all of the authorities in this State and many of the authorities of foreign jurisdiction upon this subject, announced the rule in the following language, through REYNOLDS, P. J.:

"Our own view is, that the weight of authorities in our State is to the effect that at law, averment and proof of tender is required prior to the accrual of a right of action, unless excused by its uselessness or impossibility."

The latest decision upon this subject in this State is that of Reid v. St. Louis & San Francisco Railroad Company, 187 S. W. 15, where BLAIR J., speaking for the court said:

"In the circumstances of this case it was incumbent upon respondent before he could attack the release for

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fraud in its procurement, to tender to appellant the amount received for its execution.''

It follows, therefore, from the above authorities, that it was necessary for the plaintiff in this case to have tendered back to the defendant the amount he had received as a consideration for the covenant not to sue, and it seems also that the interest ought to have been tendered prior to the institution of this suit.

The learned counsel for the respondent argue that there are exceptions on this general principle that the consideration for the release with the interest must be tendered back to the defendant before institution of the suit, and they argue that it is unnecessary to make a tender where it would be useless or not accepted, and then argue that it was evident from the conduct of the defendant that a tender in this case would have been useless and would not have been accepted, as being shown by the fact that the defendant relied upon the release at the trial and insisted that it was a valid and binding release, and as supporting this contention they cite the case of Girard v. St. Louis Car Wheel Company, 123 Mo. 358, 27 S. W. 648. In that case the majority of the court, speaking through BARCLAY, J., (BLACK, BRACE and MAC FARLANE concurring in the result) held that a failure to make a tender before bringing suit is not fatal, if the defendant gets the benefit of a tender by being allowed the amount in the verdict. MACFARLANE, BLACK and BRACE, JJ., concurred in holding that if no objection is made to the reply because it fails to plead a tender, and the defendant insists throughout the trial on the validity of the release, the appellate court will not set aside a verdict in which defendant has received credit for the amount of the consideration given for the release. In this case BURGESS, GANTT and SHERWOOD, JJ., insisted that a tender must be made before the suit is brought.

Now in the present case the counsel for the defendant raised the insufficiency of the reply at the outset of the case by objecting to the introduction of any testimony, including the tender, so that this case is not within the decision of MACFARLANE, J., in the Girard case.

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This same contention was made in the Carroll case, supra, to the effect that it would have been useless to make a tender because of the fact that the defendant relied upon the argreement at the trial, which shows that the defendant would not have accepted the tender. This was directly answered by REYNOLDS, P. J., in the following language:

"It does not seem logical to assume that because the defendant, defending against an action, after that action had been instituted and after being brought into court by process, would have declined tender of restitution if made before. Men often take positions after being brought into court that they would not have taken before that, if given the opportunity."

In this case there is no direct evidence nor any evidence by which even the slightest inference could be drawn that a tender of the consideration with interest would not have been received. After the covenant not to sue was signed there were no negotiations whatever between the plaintiff and the defendant for payment of plaintiff's claim for his injuries, and so far as the evidence shows there is not the slightest intimation that the defendant expressly or impliedly took the position that it stood upon the agreement and would under no consideration cancel it upon the tender of the consideration.

Plaintiff cites some cases of foreign jurisdictions wherein it has been held that a tender is not necessary, but they are not in accord with the rule of decisions in this State. Our attention is called by the learned counsel for the plaintiff to Black on Rescission and Cancellation, section 396, where it is laid down that it is not necessary to tender back the consideration where the fraud inheres in the execution of a release of a cause of action and is of such a character as to prevent the formation of a valid contract in the first instance (as where the claimant is fraudulently induced to believe that he is signing an instrument of an entirely different caliber and has no intention of executing a release). A plaintiff thus imposed upon, says the author, need not pay or tender the consideration received as a prerequi-

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site to his right to sue on the cause of action released, since he neither avers a release nor seeks its cancellation, but proceeds on his cause of action as though no contract of compromise had ever been made. But in this case, the plaintiff's own evidence distinctly shows that he knew he was signing an instrument which precluded him from bringing a suit against the defendant, and further evidence of numerous other persons distinctly discloses that the plaintiff knew the nature of the instrument he had signed and told them of it.

Again, we take it that where timely objection is made by defendant, as was done here, in order for a plaintiff to bring himself within the exceptions to the rule of tender, he must affirmatively plead or set up the facts which bring him within the exception, that is, he must set forth the fact that a tender was not made because useless, or some other fact showing an excuse for failure of tender, and must offer evidence proving or tending to prove those facts.

It follows from what has been said above that the peremptory instruction asked for by the defendant should have been given and the judgment is, therefore, reversed. *Reynolds, P. J.*, and *Allen, J.*, concur.

KRETZER REALTY COMPANY, Rsspondent, v. THOMAS CUSACK COMPANY, Appellant.

St. Louis Court of Appeals, December 30, 1916.

1. **LANDLORD AND TENANT: Use of Outside Walls of Building: Rights of Tenant.** Although a tenant in possession is entitled to the use of the outside walls of the rented building, and may delegate that use to a third person, he has no right to so use the outer wall as to injure the freehold, or for purposes inconsistent with the lawful and reasonable enjoyment of the property.
2. ———: ———: **Advertising Signs: Liability of Third Party.** A third party who painted advertising signs on the outside walls of a building under permission from the tenant was liable to the landlord only in the event the sign substantially damaged the freehold, since the landlord has no right of action for trespass unless the freehold is substantially damaged thereby.
3. ———: ———: ———: ———: **Instructions.** In an action by a landlord for injury to the freehold resulting from an advertising

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sign covering the outside wall of a building, which was painted thereon by defendant under permission from the tenant, an instruction for plaintiff purporting to cover the entire case and directing a verdict, but which failed to expressly require the jury to find that the property was substantially damaged by the sign, as a condition precedent to finding for plaintiff, was, because of such omission, erroneous.

4. ———: ———: ———: ———: **Instructions: Harmless Error.** The error of said instruction was harmless, and should not, therefore, work a reversal of the judgment for plaintiff, under Secs. 1850 and 2082, R. S. 1909, in view of the fact that the jury found, under a correct instruction defining the measure of damages, that the property was substantially damaged by the sign.

5. ———: ———: ———: ———: **Instructions: Harmless Error.** In such case, an instruction for plaintiff that the tenant did not have authority "to authorize or grant to defendant permission to paint a sign on said premises," while not accurately drawn, must be taken to indicate that it referred to the sign involved in the case, and, although it was erroneous for failing to require a finding that the property was substantially damaged by the sign, nevertheless such error was not prejudicial to defendant, in view of the fact that the jury found that the property was so damaged.

6. **APPELLATE PRACTICE: Punitive Damages: Instructions: Harmless Error.** An assignment of error predicated on the giving of an instruction authorizing punitive damages will not be considered, on appeal, where no such damages were awarded.

7. **LANDLORD AND TENANT: Advertising Signs: Liability of Third Party: Damages.** In an action by a landlord for injury to the freehold resulting from an advertising sign covering the outside wall of a building, which was painted thereon by defendant under permission from the tenant, the measure of damages was the difference between the value of the property immediately before and immediately after the sign was painted, and evidence tending to show that the rental value was decreased by reason of the painting of the sign was admissible as tending to show that the value of the property was thereby substantially decreased.

8. ———: ———: ———: **Damages: Evidence.** In such case, evidence that, after the sign had been painted, another building was placed on the lot, which covered up the sign, was properly excluded, since the measure of plaintiff's damages was the difference between the value of the property immediately before and immediately after the sign was painted, and any subsequent action of any person, which would increase or decrease the value of the property, would be immaterial.

Appeal from St. Louis City Circuit Court.—*Hon. Leo A. Rassieur*, Judge.

AFFIRMED.

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Bishop & Cobbs for appellant.

(1) A tenant in possession of a building has the exclusive right to use the outside walls for advertising purposes, and to permit others to use them, if not prohibited by the terms of the tenancy. Fuller & Bagley v. Rose, 110 Mo. App. 344, 347; O'Neill v. Manget, 44 Mo. App. 279; Lowell v. Strahan, 145 Mass. 9; Riddle v. Littlefield, 53 N. H. 503, 509; Salinger v. North Amer. Woolen M. Co., 70 W. Va. 151; Baldwin v. Morgan, 43 Hun. 355, 50 N. Y. Sup. 355; Broads v. Meal, 159 Cal. 765; DiMarco v. Isaacs, 132 N. Y. Sup. 363. (2) The court erred and usurped the province of the jury by instructing the jury that Mrs. Mez, the tenant of the building, had no authority to permit defendant to paint a sign on the walls. (3) There being no evidence of any wilful disregard of plaintiff's rights, it was error to refuse to instruct against punitive damages and to instruct that such damages might be allowed. (4) The court erred in refusing to give other instructions offered by defendant. (5) The court erred in so instructing the jury that it could not find in favor of the defendant without violating the instructions. (6) The court erred in permitting opinion evidence as to decrease in rental value as a measure of damages to the fee. (7) The court erred in refusing to permit defendant to prove that, after the sign had been painted, a new business building had been so erected as to cover the sign completely. 1st—Because all evidence as to damage was based on the visibility of the sign. 2nd—Because all evidence as to measure of damage was based wholly on change in rental value and not on cost of obliterating sign or on change in value of fee. 3rd—Because evidence of erection of a business house tended to show character of neighborhood and would affect question of damages. (8) The judgment was for wrong party and should be reversed.

Richard A. Jones for respondent.

(1) (a) The structure upon which the sign was painted was a dwelling rented by respondent for use as a boarding house. The sign was not only painted with-

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out authority from respondent, the owner of the property, or any attempt on the part of appellant to obtain such authority, but also in direct opposition to the protest of respondent. (b) Appellant sought to justify under an agreement with a tenant, Mrs. Mez, without any authority on her part shown to act in such regard; contending that the mere fact that she was a tenant of respondent gave to her right to grant to another permission to injure this property; for that a material injury was done thereto is established by the verdict, which is in amount considerably less than the evidence tended to prove. The mere statement of the proposition furnishes conclusion voiding appellant's contention. Under the statute, which is in some respects but a restatement of the common law, Mrs. Mez was without authority to commit waste upon the leased premises. (Sec. 7880, R. S. 1909.) So also was she by the same statute prevented from assigning or transferring her term or interest in the premises or any part thereof without the written assent of her landlord, or from contracting to or allowing appellant to paint or maintain sign thereon. Louisville Gunning System v. Parks, 126 Ky. 532; 13 L. R. A. (N. S.) 587. (2) (a) Appellant's suggestion that there is no evidence upon which to base punitive damage is without merit, in view of the conditions disclosed by the record. In any event just how the action of the court in refusing to instruct against such character of damage in any manner injured appellant is difficult to discover, for none such was assessed by the jury. (b) So also as to appellant's contention that the court erred in instructing the jury that Mrs. Mez had no authority to permit defendant to paint the sign on the wall, to so injure respondent's property. Not only is the record void of proof of any such authority, but if the burden was upon respondent to disprove, rather than upon appellant to prove it, from the facts of record and the law applicable thereto such right on the part of the tenant is distinctly negatived. (3) (a) It will scarce be contended by appellant as might perhaps seem from suggestion by way

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of argument that because of possession by the tenant at the time of the injury and the suit brought therefor, respondent may not maintain this action, for it is now settled under the decisions in this State that for any injury to real estate by a stranger, the landlord may recover his damage against the person committing such injury, and this notwithstanding tenant is in possession at the time. Arnold v. Bennett, 92 Mo. App. 156; Parker v. Schakelford, 61 Mo. 68. (4) Appellant suggests that decrease in rental value is not the proper measure of damages to the fee. It is true that such may not always be the sole criterion of the decrease or increase in the value of the real estate, but the difference in the earning capacity of any element, be it man, beast or inanimate object, is a most important factor in fixing value. And rental to be derived therefrom is to be considered in fixing the value of real estate. Krebs v. Bambrick Bros. Construction Co., 144 Mo. App. 649, 653. (5) Appellant's offer to show that before trial of the cause and subsequent to the painting of the sign another building had been erected on the lot just west of that of respondent was properly denied by the trial court. The question involved concerned the difference in value of the premises immediately before and immediately after the painting of the sign, not at any subsequent date. McGrath v. Heman Construction Co., 183 Mo. App. 522. (6) The cases cited under appellant's point I, have to do solely with the question between landlord and tenant as to the one entitled to place advertising matter on the outside walls of the premises and do not at all concern the right to paint thereon and so injure the premises. Under such decisions it is to be taken as conceded that the premises were rented for the purpose of a business, in the ordinary course requiring display of signs thereon and that the affixing and displaying of the signs would be done in such manner as not to do injury to the property. The inquiry in the cases cited referring solely to determination of whether such right was by the terms of the letting retained by the landlord or conferred upon the tenant, such decisions are a far cry from

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furnishing authority to a tenant to injure the premises or to sublet to another for such purpose. Forbes v. Gorman, 25 L. R. A. (N. S.) 318; Louisville Gunning System v. Parks (supra), 126 Ken. 532, 13 L. R. A. (N. S.) 587. (7) The witness, Jeremiah Healy, had been in the real estate business in St. Louis for fourteen years buying, selling and renting real estate. He was familiar with the property involved and the locality in which situated; knew from personal inspection and from the photo in evidence exhibited to him the conditions present and testified that by reason of the painting of the sign thereon the value of the property was decreased from $500 to $600; that the difference in the market value of the property, the value immediately before and after the painting of such sign thereon was that amount; testified that it would decrease the rental value of the property which is always an element in fixing its value; on cross-examination by appellant testified that it would decrease the rental value $3 per month. Just why the opinion of such witness was not proper evidence of the decreased value of the property, appellant in its argument nowhere discloses; the assignment of error is made that the court erred in permitting opinion evidence, but the reason upon which appellant's claim of error is based, is neither detailed by it or apparent from the proof. (8) The measure of damage fixed by the court in the instruction given at the request of respondent, is in substance the same as that sought to be described in the instruction offered by appellant and that which it approved, both by its examination of witnesses on its own behalf and objection to introduction of evidence on the part of appellant, as the one applicable to the subject matter involved. In any event it correctly states the rule to govern such subject-matter. Krebs v. Bambrick Bros. Const. Co., 144 Mo. App. 649.

THOMPSON, J.—This was a suit brought to recover alleged damages to plaintiff's fee or reversionary interest in the real estate known as 3028 Locust street, St. Louis, Missouri, for the painting of a large sign thereon by defendant. The case was tried before a jury,

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resulting in a verdict for plaintiff in the sum of $175 actual damage, and no punitive damages; judgment being rendered thereon, defendant perfected its appeal to this court.

Plaintiff was the owner of the fee to the property known as 3028 Locust street, on October 11, 1912, and had been the owner of it for a long time prior to that date, and was still the owner of it at the time of the trial. For possibly a year prior to October 11, 1912, the entire building known as number 3028 Locust street had been rented by the plaintiff through its agent to a Mrs. Mez for a boarding or rooming house. Mrs. Mez was the tenant in possession of the property, and occupied the entire building as a boarding or rooming house on October 11, 1912, and had been for possibly a year before, and continued to be until the trial of this case in May, 1914. She had during all of that time, about three years, been paying $35 per month for the premises. These premises consisted of a lot and a three-story brick building located on the south side of Locust street, setting back about six feet from the street, and surrounded by business houses and other residences. During October, 1912, there was a vacant lot immediately west of this building, making the west wall visible from Locust street. Prior to October, 1912, Mrs. Mez, the tenant, had displayed a sign advertising rooms and board for rent. This appeared upon the front of the building, but whether it was painted thereon or contained on a card sign, the evidence is not clear.

On October 3, 1912, Mrs. Mez, the tenant, gave to the defendant, in the form of a lease, permission to paint an advertising sign on the west wall of the building. This was a blank wall containing no windows and had never theretofore been painted. It seems that pursuant to this written permission or authority, the defendant between October 11 and October 14, 1912, painted an advertising sign on the west wall of this building, advertising a certain brand of chewing gum, and the sign covered the entire wall, which was forty feet in height and thirty to thirty-five feet in length.

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After the painting of this sign had been commenced by the defendant, and before it was completed, the plaintiff wrote a letter to defendant complaining of the defacement by it of the wall. The plaintiff offered evidence tending to show that this letter was received by the defendant before the sign was completed and that a representative of the defendant immediately called upon the plaintiff in response to this letter. The representative said that he would look into the matter, but plaintiff's evidence further tends to show that after the writing of the letter and after the conference with the defendant's representative, the defendant continued to paint the sign and completed it on October 14th. The defendant's evidence tended to show it received the letter written by the plaintiff on October 14, after the painting of the sign was finished. The plaintiff offered evidence to the effect that the painting of the sign upon the building immediately reduced its value and therefore damaged it to the extent of five or six hundred dollars; whereas the defendant offered evidence that the painting of the sign upon the building was a benefit to the property. The evidence does not disclose the character of the tenancy of Mrs. Mez, and we are unable to tell from a careful reading of the record whether she was a tenant from month to month or a tenant under lease for a term of years.

The court gave the following instructions to the jury at the instance and request of the plaintiff:

1. "The court instructs the jury that if you find from the evidence, plaintiff on and subsequent to the 1st day of October, 1912, was the owner of premises and building No. 3028 Locust street in the city of St. Louis, and that on or about the 11th day of October, 1912, defendant Thomas Cusack Company by or through its workman or agents, without the consent or authority of plaintiff, caused to be placed on the west wall of said building a painted sign, your verdict will be in favor of plaintiff against defendant for such amount as you may find under the other instructions and the evidence plaintiff is entitled to recover."

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2. "The court instructs the jury, that, under the evidence in this case, Mrs. T. Mez, the tenant of the property No. 3028 Locust street, did not have authority to authorize or grant to defendant, permission to paint a sign on the wall of said premises, and if you find from the evidence plaintiff to have been the owner of said property during the month of October, 1912, and that while such owner, defendant, by or through its servants or agents, without authority of consent of plaintiff, caused to be painted on the west wall thereof, sign described in evidence, then your verdict will be in favor of plaintiff and against defendant for such sum as you may find it entitled to recover under the other instructions."

3. "If the jury find from the evidence under the other instructions in favor of plaintiff, then you will assess in its favor against defendant such, if any, damages as you may believe from the evidence has been done the property of plaintiff by reason of having painted the sign described in evidence, that is to what extent, if any, said property has been injured or lessened in value by having said sign painted thereon."

The defendant excepted to the giving of each of these instructions on the part of the court.

The defendant's contention is, that a tenant in possession of a building has the exclusive right to the use of the outer walls for advertising purposes and to permit others to use them, if not prohibited by the terms of the tenancy.

The leading case upon this subject is Riddle v. Littlefield, 53 N. H. 503, and the court there says:

"Now, it will hardly be contended that the outside wall of a store or house is not essentially for the reasonable and proper enjoyment of the interior of the building. The outer side of the wall is but one side of the same wall that has an inner side, and the removal of the wall removes both sides. If, then, a lessee or grantee may have the wall which he pays for, it would seem that he should be entitled to the use of it, not only for purposes indispensable to the occupation of the building, but also for any purpose of service or profit not inconsistent with

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the lawful and reasonable enjoyment of the property. * * * * If the lessee deems it more advantageous to employ the walls for advertising the goods or business of others, receiving payment therefor, than to advertise or expose his own goods upon the wall, it is none of the landlord's business, unless he has restricted and forbidden such use of the premises, or inserted in his lease a covenant against the sub-letting of them. It would be singular if a landlord, who had leased a building for the purpose of trade, might occupy the outer walls of the said building for displaying the advertisements of a rival trader; but this result might very probably follow if the lessee might not control the use of the exterior walls."

In Fuller & Bagley v. Rose, 110 Mo. App. 344. l. c. 347-48, 85 S. W. 931, the court says:

In the absence of stipulation to the contrary, the lessee of a building to be used for business purposes acquires, under his lease, title to the whole of the building, including both sides of the outer walls, which, of course, gives him the exclusive right to use the walls for all legitimate purposes, including that of advertising (Riddle v. Littlefield, 53 N. H. 503; Baldwin v. Morgan, 43 Hun. 355; McAdams on Landlord and Tenant, sec. 442; Witte v. Quinn, 38 Mo. App. 681). . . . It has been said by some authorities that tenants in buildings of this character whose rooms are inclosed by an outer wall, have the right to use such portion of the exterior thereof for the placing thereon of their signs; but such right is a privilege acquired from universal custom—a mere incident to, not a parcel of the demised premises—and consequently not derived from title. The landlord may deprive his tenants of such privilege by stipulations in the lease, in which case the ownership of the walls remaining in him, he may use their outside surface for purposes of revenue."

In Lowell v. Strahan, 145 Mass. l. c. 9, the landlord sued the tenant to recover money which the tenant had received from persons to whom the tenant had given a license to place signs on the outer wall of the building.

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The premises occupied by the tenant consisted of the first floor and front part of the basement. The tenant had given permission to other parties to paint signs on the walls of the first floor. The court said:

"In the case at bar, the words of description naturally included the premises in question—the outer walls. It is plain that the lease grants not merely an interest in the walls, like the incidental right of support or shelter which it grants in the land and other parts of the house, but the right to use and enjoy, as leased premises, for the purpose of business. That right is exclusive. The landlord has no right to use or to let it for such purposes. From the mere demise, without regard to special provision of the lease, there is no reason that the landlord should be regarded as having rights in the outside, different from what he has in the inside of the wall. . . . We can see nothing in the nature of the estate granted, therefore, that should prevent the outer wall from being included as a parcel of the demised premises. On the contrary, the fact that it is of value to the tenant for the use for which the premises may be occupied, and of no value for use to the landlord, would indicate that it was part of the premises, if the description was doubtful. . . . It is contended that the agreement of the defendant to allow the sign of a stranger, in consideration of annual payment by him, to remain upon the outside wall demised, was a breach of the covenant not to underlet any part of the premises. But this was a license and not a lease. It was permission to do a particular act; namely, to affix a sign on the wall and gave no authority to do any other act upon the premises."

In the case of Jeanette Fischer Forbes v. John J. Gorman et al., 25 L. R. A. (N. S.) 318, the Supreme Court of Michigan, in speaking of the right of tenant to paint signs on the outside of the property, said:

"The lease of a building or of one floor or story thereof conveys to the lessee the absolute dominion over the premises leased including the outer as well as the inner walls. Such lessee obtains the right, in the absence of restrictions, to use said premises, including the

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walls, for all purposes not inconsistent with the lease. He acquires the right to the use of the outer walls, and can put any sign or signs thereon which work no injury to the freehold. The landlord in such a lease retains no right to permit signs or advertising of other parties to be placed upon the outside walls of the leased building."

To the same effect are are following cases: Broades v. Mead, 159 Cal. 765; Salinger v. North American Woolen Mills, 70 W. Va. 151; 24 Cyc. 1047; Baldwin v. Morgan, 43 Hun. 355, N. Y. Sup. 355, l. c. 357; O'Neil v. Manget, 44 Mo. App. 280; Witte v. Quinn, 38 Mo. App. 681.

In McAdams on Landlord and Tenant, volume 2, page 1521, it is said:

"Where a room in a house is rented for occupancy, it does not include the right to occupy the outer walls with signs and advertisements, but when a part of a house, and especially the principal room, is rented as an office for carrying on a professional business as a store, the lease carries with it the right to occupy the walls or other places of the portion rented with signs, calling attention to the lessee's business in the ordinary way. In other words, where a tenant hired a house or rooms for residential purposes, there is no implied authority to put up signs, but where the renting is for business purposes, it is to be presumed that the name and business of the occupant are to appear on the walls of the house; such being the universal custom."

From the above authorities it is therefore plain that the tenant in possession is entitled to the use of the outside of the walls, just as he is entitled to the use of the inside of the walls, and can delegate that use to a third person, and the landlord has no right to the use of the walls for himself, nor to grant to others the permission to use the walls, but the above authorities, as is clearly pointed out in the case of Jeanette Fischer Forbes v. John J. Gorman et al., 25 L. R. A. (N. S.) 318, supra, also clearly establishes the rule that the tenant in possession of the property cannot so use the outer wall as to injure the freehold, nor can he use them for a pur-

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pose inconsistent with the lawful and reasonable enjoyment of the property.

We believe that, in a proper case, it might with much force be contended as a matter of law that a tenant of a dwelling house, used as a boarding house, could not grant to a third person the privilege of painting a chewing gum sign covering one entire side thereof, because it would be a use of the wall inconsistent with the lawful and the reasonable enjoyment of the property, but as to this we do not rule in this case. But even if that were so, as a matter of law, still in this case the defendant, a third party, would only be liable to the plaintiff in the event that by the painting of such sign the freehold was damaged, because it is only trespass resulting in substantial damage to the freehold that gives a right of action to the landlord when a tenant is in possession. If a tenant has permitted a third person to unlawfully use a part of the premises, the landlord would have, as between him and the tenant, the right to terminate the tenancy, but the owner or landlord only has a right of action against a third party in the event the freehold is substantially damaged, and so even though it is an unwarranted or unreasonable use of the premises for a tenant of a dwelling house, operating a boarding house therein, to cover one entire side of the house with a chewing gum sign, if the tenant permitted a third party to paint the sign, the third party is only liable to the owner in the event the sign has done substantial damage to the freehold, and, of course, the sign has done substantial damage to the freehold if, immediately upon the placing of the sign upon the building, the value of the property materially declines in a substantial amount.

But, irrespective of this, the jury by its verdict found that the sign in question did material substantial damage to the freehold. It is plain under the above authorities that the tenant had no authority to so paint a sign on the west wall of the building as to do material damage to the freehold, and it follows that the tenant had no authority to permit others so to do, and the defendant was therefore liable to the owner for the sub-

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stantial damage it did to the freehold by the painting of the sign.

Instruction No. 1 given for the plaintiff undertook to cover the entire case and direct a verdict. The instruction is defective, we believe, because it did not expressly require, by its terms, the jury to find that the property was substantially damaged by the sign before they could find for the plaintiff and against the defendant. We are not unmindful of that class of cases holding that an instruction which attempts to cover the whole case and direct a verdict, must include every fact necessary to a recovery (Hall v. Manufacturers Coal & Coke Company, 260 Mo. 351, 168 S. W. 927; Ghio v. Schaper Bros. Mercantile Company, 180 Mo. App. 686, 163 S. W. 551; Walker v. White, 192 Mo. App. 13, 178 S. W. 254; Wilks, by next friend, v. St. Louis & San Francisco R. R. Co., 159 Mo. App. 711, 141 S. W. 910), yet we believe that, in a case like this, where every fact necessary to a recovery is incorporated in the instruction, except the fact that the jury should further find that the property was substantially damaged, and that fact is established by the verdict of the jury, under a proper instruction on the measure of damage, the omission should not be considered reversible error. Every other fact necessary to a recovery by the plaintiff and against the defendant was incorporated in the instruction, and the instruction ought to have told the jury that they must further find that the freehold had been substantially damaged to have been in accord with the above authorities, but inasmuch as the jury found in its verdict that the property was substantially damaged, we are at a loss to see how the omission could possibly constitute reversible error. So far as this case is concerned, it is an established fact that the freehold was damaged by the painting of the sign to the extent of $175, a substantial sum. If at the trial of the case the counsel for the defendant had admitted that by the painting of the sign the freehold was substantially damaged, the instruction would not have been defective in failing to tell the jury that before they could return a verdict for the plaintiff they must find that the prop-

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erty was substantially damaged. If this be true, when the fact is admitted, certainly the omission would not constitute reversible error when the fact be found by a jury under a proper instruction on the measure of damages. Believing as we do, therefore, it is our duty, under sections 1850 and 2082, Revised Statutes, 1909, to disregard the defect in said instruction.

The second instruction given for the plaintiff told the jury that Mrs. Mez, then tenant, did not have authority to authorize or grant to defendant permission to paint a sign on the wall of said premises. This instruction must, of course, be taken to refer to the sign involved in this case, a sign which the jury found did substantial damage to the freehold. Viewed in this light, while the instruction perhaps was not accurately drawn, we do not believe that the giving of it constitutes such error as requires the reversal of this case. The instruction ought also to have required the jury to find that the freehold was substantially damaged, but what has been said above with reference to instruction number one applies here, inasmuch as the jury found that there was substantial damage under these two instructions, both of which expressly refer to the instruction on the measure of damage. The court at the instance of defendant gave an instruction to return a verdict for nominal damage in the event that no damage was done to the property by the painting of the sign. With this instruction on behalf of the defendant and instruction number three on behalf of the plaintiff the jury found that the property had been substantially damaged.

The defendant also complained of an instruction given on behalf of the plaintiff authorizing a recovery of punitive damages, but inasmuch as the jury returned no punitive damages against the defendant, it has no cause for complaint in this respect.

The defendant complains because the court admitted, over its objection, evidence tending to show that the value of the property was decreased by the sign, because its rental value would be decreased. We think that there was no error in allowing this evidence, or any other evi-

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dence which would tend to show that the value of the property was substantially decreased immediately upon the painting of the sign; in fact, it appears that the defendant's theory of damages, in the event that plaintiff was entitled to recover, was the difference in value of the property immediately before the sign was painted and immediately after the sign was painted, and any evidence directed to that subject at that time tending to show these values was competent evidence.

The defendant also offered evidence that, after the sign had been painted, another building was placed on the lot immediately to the west of the property involved in this case, which covered up the sign. This evidence was excluded and defendant complains of it. This evidence, we believe, was properly excluded. When the sign was placed upon the building it was either immediately damaged or it was not damaged. If it was immediately damaged and declined, then the plaintiff would be entitled to recover the difference between the value of the property before and after the sign was placed thereon. Any subsequent action of any person which would either increase the value of the property or decrease the value of the property would be immaterial, because the measure of damage is to be determined between the valuse of the property at the time of the act complained of. Finding no reversible error, the judgment of the circuit court is affirmed. *Reynolds, P. J.*, and *Allen, J.*, concur.

W. D. COLLINS et al., Appellants v. JOHN PFINGSTEN LEATHER COMPANY, Respondent.

St. Louis Court of Appeals, December 30, 1916.

1. **COUNTERCLAIMS: "Set-off:" "Recoupment."** The terms "set-off" and "recoupment" are included in the term "counterclaim;" the difference in the two being important only by reason of the fact that the former must arise from contract and can be used only in an action founded upon a contract, while the latter may spring from a wrong, provided it arose out of the transaction set forth by the claimant or is connected with the subject of the action.

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2. **REPLEVIN: Counterclaims.** A counterclaim may be interposed in an action of replevin, where it is founded upon a cause of action arising out of the contract or transaction set forth in the petition as the foundation of plaintiffs claim, or where it is connected with the subject of the action.

3. ———: ———: **Liens.** In an action to replevy hides tanned into leather by defendant for plaintiff, under a contract, where defendant sought to justify the detention on the ground it had a lien on the hides for compensation due for the tanning, it was proper for plaintiff, in his reply, not only to dispute the claimed indebtedness, but also to set up a counterclaim for a larger amount owing by defendant on indebtedness growing out of the contract on which the lien claim is founded, by way of set-off or recoupment, for the purpose of defeating the lien; and the rejection of evidence tending to establish such counterclaim was reversible error.

4. **LIENS: Excessive Demand: Waiver of Lien.** The mere demand of an excessive sum by a creditor holding a lien on chattels for work performed is not a waiver of the lien for the sum really due; the artisan losing his lien only where he so mixes his accounts that his claim against the given property cannot be distinguished from other accounts.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillan,* Judge.

REVERSED AND REMANDED.

Frank H. Sullivan and *Charles E. Morrow* for appellants.

(1) Counterclaims connected with the subject of the action are permissible in replevin suits. McCormick Harvester Co. v. Hill, 104 Mo. App. 544; Ely v. Sutton, 177 Mo. App. 546, 556. (2) Damages arising in connection with the subject-matter may be set off in a replevin suit against the debt claimed by the defendant as a lien upon the property replevined. Close v. Hurst, 151 Mo. App. 75. (3) If the plaintiffs had advanced money to the defendant, or there was due the plaintiffs interest on moneys so advanced, and for investments in hides under the contract in question, which equalled or exceeded the amount of the indebtedness claimed by the defendant, then the plaintiffs were not indebted to the defendant at the time of the institution of this suit, and defendant had no lien upon the hides in question, and the court erred in excluding plaintiffs' evidence to so show. Close v. Hurst, 151 Mo. App. 75, 79. (4) The court erred in

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refusing to permit the plaintiffs to show that the defendant had damaged and retained and converted to its own use other hides received by it to be tanned under the contract in question, and that the plaintiffs were damaged thereby in a sum greater than the amount claimed by the defendant. Close v. Hurst, 151 Mo. App. 75; Crane v. Murray, 106 Mo. App. 697; Gordon v. Bruner, 49 Mo. 570; Mathes v. Lumber Company, 173 Mo. App. 239. (5) The defendant in no event had a lien upon the hides in question in this suit for services rendered in tanning other hides unless there was a custom or a special agreement to the contrary, and no such custom or agreement was shown in this case. Therefore, the claim of $1666.68 made by the defendant upon the plaintiffs before the hides in question could be delivered to the plaintiffs, when under the contract it is admitted that the defendant is only entitled to $999.26, was excessive under any view, and the defendant thereby lost its lien. Kirtley v. Morris, 43 Mo. App. 144, 151. (a) In any event, if the demand for $1666.68, made by the defendant, was not made in good faith, and amounted to an announcement that it was useless for the plaintiff to tender a smaller sum, it dispensed with any tender and was a waiver of the lien, and the court erred in refusing the plaintiffs' instruction No. 1. 25 Cyc. 677. (b) Admittedly the defendant joined a non-lien demand, if it had any demand against the plaintiffs, with its alleged lien demand of $999.26 for tanning the particular hides in question, and thereby it lost its lien. 25 Cyc. 677; Bicknell v. Trickey, 34 Me. 273. (c) The defendant, in this case, if it had a demand in excess of $999.26, the largest amount to which it was entitled for tanning the hides in question, mingled its accounts and demanded of the plaintiff the sum of $1666.68, before the leather would be delivered to the plaintiffs, and thereby lost its lien. Kirtley v. Norris, 43 Mo. App. 144, 151. (6) The court erred in permitting the defendant to introduce the testimony of the witness Walter, that the tanning of the hides in question cost it six cents per square foot. The defendant had agreed to tan the leather in question for

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a certain price, and it was not only immaterial but prejudicial error to permit the defendant to show that the tanning of the hides in question actually cost it more than the contract price. The court also erred in refusing plaintiffs' refused instruction No. 5, which stated to the jury that if they believed from the evidence that the defendant had agreed to treat and tan the leather in question in a good and workmanlike manner, and render the same into salable leather for four cents per foot for side leather, and one and one-half cents per foot for split leather, then it was the duty of the defendant to so tan said hides, regardless of the cost to defendant.

Arthur N. Sager and *Chas. T. Abeles* for respondent.

(1) Replevin is in form an action *ex delicto* for the specific reparation of a tort. It is no justification for a tortious act that the tort-feasee is indebted to the tort-feasor. Waterman on Set-off (2 Ed.), sec. 144, p. 169. (2) If a claim does not arise out of the contract or cause of action set forth in the petition as the basis of the plaintiff's claim, or is not connected with the subject matter, it cannot be used as a set-off in a replevin suit. The plaintiffs' offers of evidence of advances made to the defendant, and of all claims arising in connection with other shipments of hides, were properly refused in the absence of proof that the advances were made in payment of work done on the hides in question, and that the shipments were all made in pursuance of a single contract. McCormick Harvesting Co. v. Hill, 104 Mo. App. 546, 558. (3) The right of set-off is a purely statutory one and its exercise is dependent upon the mutuality of the debts attempted to be set-off. A demand of damages for a tort is not a debt and is not embraced in the statute of set-off. Hence, the plaintiffs' offer of evidence to prove that the defendant had damaged and retained and converted to its own use other hides received by it, was properly refused. State to use, v. Modrell, 15 Mo. 421; Caldwell v. Ryan, 210 Mo. 17, 25. (4) A general claim cannot be set-off against a special one which is funda-

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mentally a property right. Haseltine v. Thrasher, 65 Mo. App. 334, 342. (5) The claim by a lien holder of a sum in excess of that due him, does not of itself waive the lien. Monteith v. Great Western Printing Co., 16 Mo. App. 450,453; Kirtley v. Morris, 43 Mo. App. 144, 151; 25 Cyc. 677. (a) There should be no distinction between the legal consequences of an excessive claim and the joining of a lien and a non-lien demand. Consequently, in whichever light the defendant's action is viewed, the lien is not lost. Scarfe v. Morgan, 4 Mee & W. 270. (b) The defendant's accounts were not so mingled as to make it impossible to distinguish the claim against the property in question. Kirtley v. Morris, 43 Mo. App. 144, l. c. 151 (6) Even though the evidence tending to show that the tanning of the hides in question actually cost the defendant more than the contract price was immaterial, the admission of this evidence was in no way prejudicial to the plaintiff, for the court charged the jury (Instruction No. 3, given by the court of its own motion) that the law required the defendant to tan the hides in the manner and for the prices specified by the agreement. The material points of the plaintiffs' refused instruction No. 5, which stated to the jury that if they believed from the evidence that the defendant had agreed to treat and tan the leather in question in a good and workmanlike manner and render the same into salable leather for four cents per foot for side leather, and one and one-half cents per foot for split leather, then it was the duty of the defendant to so tan said hides, regardless of the cost to the defendant, were incorporated in the third instruction given by the court of its own motion, and this refusal was not, therefore, reversible error.

THOMPSON, J.—This is a suit in replevin for one hundred and forty-two bales of leather. The petition was filed in the circuit court, city of St. Louis, on the 7th day of February, 1913, and is in the usual form, accompanied by an affidavit that the property was wrongfully detained and that its actual value was $4000, and that the plaintiffs would be in danger of losing said

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property unless it be taken from the possession of the defendant or otherwise secured. The order of delivery was duly made by the court and thereafter the plaintiffs gave the sheriff a bond in the sum of $8000, and the sheriff thereupon took the property and delivered it to plaintiffs.

The suit was originally against John Pfingsten Leather Company, Chicago & Alton Railroad Company and Columbia Transfer Company, but the Railroad Company and the Transfer Company simply had all the leather in question as carriers, and by stipulation of all of the parties the cause was dismissed as to those two defendants. The real issues were raised by the answer of the defendant, John Pfingsten Leather Company and the reply of the plaintiffs thereto.

The answer of the defendant, John Pfingsten Leather Company, alleged that it was a corporation and that the plaintiffs were co-partners and alleged that on or about the 15th day of August, 1912, it entered into a verbal contract with the plaintiffs to treat and tan at its tannery in Milwaukee, Wisconsin, certain hides to be furnished by plaintiffs at a price of four cents per square foot, and that pursuant to that contract plaintiffs furnished and delivered to the defendant certain hides which were treated and tanned by it and converted into leather, and that after this was done and they were finished and ready for shipment, the leather was bundled into convenient form for shipment, and aggregated one hundred and forty-two bundles and contained about twenty-four thousand nine hundred eighty-one and one-half square feet of leather; that, on or about the 29th day of January, 1913, these bundles of leather were delivered to the Goodrich Transit Company, a common carrier, consigned and billed to the order of itself at St. Louis, Missouri, notify the plaintiffs, and that when the said leather so billed arrived in St. Louis and was in possession of the Chicago & Alton Railroad Company it was seized by the sheriff under writ of replevin and given into the possession of the plaintiffs. Defendant further alleged in its answer that the plaintiffs were not

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entitled to the possession of the leather for the reason that it had a lien on the leather, under the law, for work and labor which it had done in converting said hides into leather, which lien, at the agreed price of four cents per square foot, amounted to the sum of $999.26, and that the defendant had the right of possession of said leather to satisfy its claim for that amount, therefore defendant prayed judgment against the plaintiffs for the possession of the one hundred and forty-two bundles of leather and for damages in the sum of $500, or in the event the plaintiffs were unable to restore the leather, judgment was asked against the plaintiffs and each of them in the sum of $999.26, with interest and $500 for damages.

To this answer the plaintiffs filed a reply, in which they admitted that the defendant was a corporation doing business in Milwaukee, Wisconsin, and that they had furnished the hides from which the one hundred and forty-two bundles of leather were made, involved in this case, and admitted that on or about the 29th day of January, 1913, the defendant had shipped the one hundred and forty-two bundles of leather from Milwaukee to St. Louis, consigned to the order of itself, notify plaintiffs, and admitted that they had taken possession of the leather under a writ of replevin. Plaintiffs further replying stated that, on or about the 22nd day of August, plaintiffs and defendant entered into an oral contract whereby the defendant agreed to treat and tan hides which were to be bought and furnished by the plaintiffs, at a price of four cents per square foot for grain leather and one and one-half cents per square foot for split leather, and that by the terms of said oral agreement the defendant was to pay interest to the plaintiffs at the rate of six per cent. per annum on the money invested by the plaintiffs in the hides purchased and shipped to defendant for tanning under said contract, and also interest at six per cent. per annum upon any sums of money advanced to defendant by plaintiffs for any reason whatsoever in connection with said contract, and that defendant agreed to tan all hides in a good and workmanlike manner. For further reply, the plaintiffs

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stated that after the making of said oral contract, and pursuant thereto, the plaintiff delivered to the defendant at Milwaukee, Wisconsin, certain hides, and also purchased and held certain hides under the contract for defendant to be treated by it under said contract, among which were the leather and hides in question in this suit, being one hundred and forty-two bundles. The plaintiffs denied that the said hides were duly and properly tanned and converted into leather, and denied that the reasonable value for so treating and tanning these one hundred and forty-two bundles was four cents per square foot, or any other sum, and alleged that in the tanning of these one hundred and forty-two bundles of hides in question, the defendant so treated them that they became damaged and depreciated in value to the extent of $1998.48, and that therefore the plaintiffs were not indebted to the defendant in the sum claimed in the answer, or any other amount, and that therefore defendant had no lien upon the one hundred and forty-two bundles of leather involved in this controversy. Plaintiffs replying further stated that at the agreed price of four cents per square foot, the defendant would only have a claim for services rendered in tanning said hides, amounting to $999.26, and that at the time the said hides in suit were shipped bill of lading was attached to secure $1666.68 and this was an exorbitant and unreasonable amount and included an unjust and non-lien demand which was grossly excessive, and because of this fact defendant had no lien upon the one hundred and forty-two bundles of leather involved in this case. Further replying the plaintiffs stated that after entering into this oral contract they from time to time advanced money to the defendant on said contract, which was unpaid at the time this suit was instituted, and which amounted to $752.54, and further alleged that plaintiffs had invested in hides to be furnished under said contract, the interest on which at the rate of six per cent. per annum, in accordance with the terms of the contract, amounted to $2126.86, and this, together with the amount advanced, aggregated $2879.40, which was due and owing under said contract from the

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defendant to the plaintiffs at the time of the institution of the suit, and that therefore, even if the defendant had a claim for services rendered in tanning the hides amounting to $999.26, it should be deducted from the amount due from defendant to plaintiffs under the contract, and that defendant, therefore, could not have a lien upon the one hundred forty-two bundles of leather. Further replying plaintiffs alleged that it had delivered to defendant under said contract certain half hides to the number of one thousand fifteen, and of the value of $279.12, which defendant received but neglected to tan, and converted the same to its own use, thereby rendering defendant further indebted to plaintiffs. Further replying the plaintiff alleged that it delivered to defendant certain hides to be treated under said contract to the value of $2618.78, and that defendant failed to treat said hides in a workmanlike manner, but on the contrary in the process of tanning they entirely ruined them and rendered them worthless, and that because of that fact the defendant was indebted to the plaintiffs in the sum of $2618.78 for said hides so ruined, and that because of that fact defendant had no lien or charge against the hides involved in this case.

The evidence tended to show that the defendant was operating a tannery in Milwaukee, Wisconsin, and that in August, 1912, Mr. Collins, one of the plaintiffs, made an arrangement with the defendant to tan hides for the plaintiffs. The contract was oral. By the terms of this contract it was orally agreed between the plaintiffs and defendant that the plaintiffs should furnish certain hides to the defendant to be tanned, and the plaintiffs were to pay the defendant four cents per square foot for tanning the grain leather and one and one-half cents per square foot for tanning split leather. The president of the defendant company indicated that from time to time he would have to have money advanced to him by the plaintiff to carry on the work of tanning the hides under the contract. Plaintiffs agreed to advance said moneys from time to time, and the evidence shows that some advances were in fact made. Under the terms

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of the agreement the defendant was to pay the plaintiffs six per cent. interest on said sums so advanced, and also was to pay the plaintiffs six per cent. interest on the moneys invested by the plaintiffs in said hides which were to be tanned by defendant under said contract, and it was further agreed that after the tanning had been done and the leather was sold, the defendant was to allow plaintiffs five per cent. for selling the leather, and then the profits which accrued upon the selling of the leather, if any, were to be divided equally between plaintiffs and defendant. It was further understood that the leather was to be tanned by defendant in a workmanlike manner. There was no substantial dispute between the parties on the terms of the above agreement. Under these arrangements the plaintiffs bought and shipped to defendant at Milwaukee, for tanning, certain hides, among others and hides from which the one hundred and forty-two bundles of leather involved in this suit were made.

The plaintiffs offered evidence to substantiate the various allegations set forth in its reply: First, to the effect that the hides from which the one hundred and forty-two bundles of leather involved in this case were made were not properly tanned, resulting in the leather depreciating $1998.48; second, that defendant was indebted to it under the contract for money advanced and interest on the money invested amounting to $2879.40; third, that defendant had converted certain hides to its own use amounting to $279.12; and fourth, that defendant had damaged other hides furnished under the contract in the process of tanning rendering them worthless, which were of the reasonable value of $2618.78.

All of this evidence was objected to and the objection was sustained by the court, except the evidence to the effect that the defendant had treated the hides, from which the one hundred and forty-two bundles of leather involved in this case were made, in an unworkmanlike manner. The court allowed evidence offered on the part of the plaintiffs, tending to establish this fact, to be admitted.

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The defendant contended that the condition of the leather of the one hundred and forty-two bundles involved in this case was not on account of the tanning, but on account of the condition of the hides, in that they were poor and it was impossible to make good leather out of them and defendant's evidence tended to show this. On instructions covering this point alone, the case went to the jury. The jury found a verdict in favor of the defendant. Plaintiffs filed a motion for a new trial, and upon it being overruled, appealed.

As indicated before, the trial court ruled that the plaintiffs could only show the damage to the hides in question, if any, and whether or not plaintiffs had paid the defendant for tanning the particular hides in question, and ruled that the plaintiffs could not show that the defendant at the time the suit was instituted was indebted to the plaintiffs for sums of money advanced under the contract amounting to $752.54 and interest on the amount invested, amounting to $2126.86, or that defendant was indebted to it to the extent of $279.12 for the split or half-hides alleged by plaintiffs to have been converted to defendant's own use, or that defendant was indebted to plaintiffs in the amount of $2618.78 by reason of having improperly tanned, spoiled and rendered worthless certain other hides delivered by plaintiffs to defendant to be tanned under the contract, and refused to permit the plaintiffs to show the state of the account between the plaintiffs and defendant under the contract, and in effect ruled that even though defendant was indebted to plaintiffs, it had a right to hold the hides in question until plaintiffs paid defendant for tanning the same and that plaintiffs could not show by way of set-off or recoupment or otherwise, any other demand or claim growing out of the contract against defendant's claim. To the exclusion of this evidence by the learned trial court the plaintiffs excepted at the time and now assigns error for the same in this court.

It is held that under our Code the terms "set-off" and "recoupment" are included within the term "counter-claim" and the distinction between set-off and recoup-

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ment is now important only from the fact that the former must arise from contract and can only be used in an action founded upon contract, while the latter may spring from a wrong, provided it arose out of a transaction set forth by the claimant or connected with the subject of the action. [Gordon v. Bruner, 49 Mo. 570.] The rule of the earlier cases was that a set-off or recoupment was not allowable in an action of replevin except where equitable relief might be demanded under exceptional circumstances. [Mackey v. Dillinger, 73 Pa. State 85; Phillips v. Monges, 4 Whart (Pa.) 226; Warner v. Caulk, 3 Whart (Pa.) 193; Peterson v. Haight, 3 Whart (Pa.) 150; Patch Manufacturing Company v. Killinger, 26 Pa. Co. Ct. 539.] This was on the theory that the action of replevin sounded in tort for the wrongful detention of personal property and that set-off, recoupment or counterclaim, whatever might be its nature, could not be pleaded in an action of replevin, for it reasoned it is no justification for a tortious act that the tore-feasee is indebted to the tort-feasor, and in some jurisdictions the filing of a counterclaim or set-off in a replevin suit is expressly prohibited by statute. [Sylvester v. Ammons, 126 Ia. 140.] Since the adoption of the Code in most of the States, the doctrine of set-off and counterclaim has undergone much change. At first, counterclaims were held not to be available in any action for a tort and, therefore, not in replevin, which sounds in tort. [Gottler v. Babcock, 7 Abb. (N. Y.) 392.] But this rule has been so far modified as to allow the interposition of a counterclaim in the full sense of the Code, whether arising on contract or based upon a tort, in an action of replevin, whenever such counterclaim or setoff is founded upon a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or whenever it is connected with the subject of the action. [Reardon v. Higgins, 39 Ind. App. 363; Deford v. Hutchinson, 45 Kansas 318; Thompson v. Kessel, 30 N. Y. 383; Wilson v. Hughes, 94 N. C. 182; Clement v. Field, 147 U. S. 467.] In this jurisdiction the following cases are to to the same effect: McCormick

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Harvesting Machine Company v. Hill, 104 Mo. App. 544, 79 S. W. 745; Close v. Hurst, 151 Mo. App. 75, 131 S. W. 751; Ely v. Sutton, 177 Mo. App. 546, 162 S. W. 755; Babb v. Talcott, 47 Mo. 343. There are decisions in which the right of counterclaim is recognized, but in which the facts required it to be enforced only so far as necessary to defeat the plaintiff's demand, and some of the decisions expressly confined it within that limit, and deny the right to obtain affirmatve relief on the counterclaim. [Johnson v. St. Louis Butchers Supply Company, 60 Ark. 387, 31 S. W. 429; Ames Iron Works v. Rea, 56 Ark. 450, 19 S. W. 1063.] In other words, in these decisions the effect of the counterclaim is purely defensive and no judgment is rendered on the counterclaim. In other decisions counterclaims in replevin suits are not only sustained, but enforced to the extent of granting affirmative relief to defendants by judgment in their favor for amount above the amount found to be due the plaintiff. That is to say, the counterclaim is enforced in its proper sense, as a separate cause of action in favor of a defendant, and not merely as a matter of defense against a plaintiff's case. [McCormick Harvesting Machine Company v. Hill, 104 Mo. App. 544, 79 S. W. 745, and cases therein cited.]

The McCormick Harvesting Machine Company case, supra, is the leading case in this State upon the matters involved herein. This was a case where the plaintiff brought replevin for the possession of certain horses and cattle covered by a chattel mortgage, given by the defendant to plaintiff. The defendant had purchased from the plaintiff a wheat binder and gave promissory notes, secured by a chattel mortgage on the horses and cattle in question. The defendant in this action filed a counterclaim, avering that he had purchased of plaintiff a wheat binder and had executed his promissory notes therefor, secured by a chattel mortgage on the horses and cattle in question. The defendant paid plaintiff $42 on the notes, which were secured by the chattel mortgage, and defendant further alleged that the plaintiff, without legal process, had taken possession of the

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binder, of the value of $125, for the purpose of applying it on said indebtedness, and that defendant had overpaid the plaintiff. On trial, the defendant recovered a judgment against the plaintiff for the sum of $87.50. This judgment, the court held, under the evidence, was excessive, because it was found by the jury that the value of the machine, taken from defendant in payment of the notes, only amounted to $87.50, and that defendant had paid on the notes, secured by the chattel mortgage, the sum of $42 in cash, making a credit on the said notes of $129.50, which would still leave the notes unpaid, but the court distinctly held that the defendant had the right to plead the counterclaim and would have been entitled to judgment in its favor and against the defendant if the evidence had shown, as defendant contended, that the aggregate amount of cash paid on the notes, secured by the mortgage, and the value of the machine turned over by defendant to plaintiff, had amounted to more than the notes secured by the chattel mortgage. In this case Judge GOODE, held that the "subject of the action" was neither the animals mentioned in the complaint, nor their unlawful detention, but was the debt and the chattel mortgage, and the plaintiff's right to the property depended on whether or not the notes had been paid and the lien of the mortgage thereby destroyed, the indebtedness being the subject of the action and its existence the fact in dispute.

In this case the plaintiffs by their reply disputed the indebtedness claimed by the defendant for which it had a lien upon the leather. The plaintiffs claimed that even though the defendant had properly tanned the hides in question and under the contract of four cents per square foot had a claim against the plaintiffs amounting to $999.26, yet plaintiffs had a claim by way of off-set or recoupment against defendant growing out of the very contract which was the foundation of defendant's lien, amounting to more than the amount of the lien claimed by defendant. We are of the opinion that such matters may be said to constitute a cause of action which arises out of the contract which is the foundation of the de-

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fendant's lien as set forth by it in its answer in this case, and just as it would be a defense even to the extent of affirmative relief if the defendant were suing for the amount it claims, so it is available here as an off-set to the amount claimed by defendant to be due him under the contract and for which he has a lien on the leather. Or, again, it might be said, as was said by Judge GOODE in the McCormick Harvesting Machine Company case, supra, that the subject of the defendant's claim is the indebtedness claimed to be due from plaintiffs to the extent of $999.26. If plaintiffs did not owe this amount, or any other amount to defendant for work and labor done and material furnished upon the hides in question, then defendant, under the facts of the case, had no right to retain them in their possession, and as we understand it, plaintiffs offered to show that very thing.

In 34 Cyc. page 1418, in speaking of this subject it is said:

"If a counterclaim may be set up in a reply, it can be only to defeat a recovery on a counterclaim in the answer, and not for any affirmative judgment on it."

And it is held in the case of Townsend v. Minneapolis Cold Storage Company, 46 Minnesota 121, that where in an action of replevin defendant justifies the detention upon a lien claimed for storing the property, the plaintiff may, in order to defeat the claim of lien, allege and prove damages sustained by him to the property stored, to as much as or more than the amount claimed to be due for storage.

In the case of Babb v. Talcott, 47 Mo. 343, the action was for the possession of a quantity of wheat and the defendant's retention of the wheat was maintained on the ground that he had a lien on it for warehouse charges. A reply was filed in the nature of a recoupment charging that some forty bushels of wheat while in possession of the warehouse were lost through their negligence, causing damage to the plaintiff in an amount equal to their charge. That recoupment against the defendant's lien in favor of the plaintiff was approved by the Supreme Court.

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The case of Brown v. Buckingham, 11 Abb. Prac. 387, was a suit to recover the possession of three hundred and twenty-five pounds of silk which was delivered to the defendant for the special purpose of being manufactured into sewing silk and which had been so manufactured, and which silk the defendant illegally detained after demand. The defendant by answer denied the plaintiff's alleged right to the possession of the silk, claiming to have a lien thereon for some $500, and claimed also by counterclaim that some time previous he had sold and delivered to plaintiff certain silk for which there remained due to him the sum of $400, and averred that such sale and delivery arose out of the contract and transaction set forth in the complaint as the foundation of the plaintiff's claim and was connected with the subject of the action. The plaintiff demurred to the answer and counterclaim. The demurrer was sustained, but the court held that if the answer had sufficiently and fully stated that the silk sold by defendant to plaintiff had been sold and delivered under any contract which included or applied the silk demanded by the plaintiff, or had set forth any facts connecting in any way the transaction stated in the complaint with the supposed cause of action stated in the answer, in that event it would have been available to defendant and the answer would have been good.

We believe, therefore, that the evidence offered by the plaintiffs to support the allegations in the reply tending to show that the plaintiffs were not indebted to the defendant for work and labor done on the hides in question under the contract set forth in the answer and reply was improperly excluded.

When the leather involved in this case was originally shipped from Milwaukee, Wisconsin, the defendant claimed that the plaintiffs were indebted to it for work and labor done under this contract, and for which it had a lien on the hides to the extent of $1666.68. At the trial the defendant admitted by its answer that the indebtedness amounted to only $999.26, and plaintiffs maintain that since the defendant claimed a greater amount than

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was due, it thereby waived its lien, if it ever had one, and that the judgment should be reversed.

In 25 Cyc., 677, it is said:

"The mere demand of an excessive sum by a creditor holding a lien does not dispense with a tender nor waive his lien for the sum really due."

In Kirtley v. Morris, 43 Mo. App. l. c. 151, it is said:

"Nor ought the fact that he claimed there was more owing him than he afterwards claimed. [Everett v. Coffin, 6 Wend. 603; Comstock v. McCracker, 53 Mich. 123] Though, there is authority contrary to the latter proposition, I am inclined to the opinion that claiming a lien for too much is not a waiver of the rightful lien. If the artisan claims more than his legal right, the demandant should tender him the sum for which he has a rightful lien."

And it seems that it is only in those cases where an artisan so mixes his accounts that his claim against the given property cannot be distinguished from other accounts that he loses his lien. [Kirtley v. Morris, 43 Mo. App. 144.]

It follows from what has been said that the judgment of the lower court should be reversed and the cause remanded, and it is so ordered. *Reynolds P. J.*, and *Allen, J.*, concur.

STATE OF MISSOURI to the use of NAT J. GOODMAN et al., Appellants, v. REGENT LAUNDRY COMPANY et al., Respondents.

St. Louis Court of Appeals, December 30, 1916.

1. **CONTRACTS: Non-execution by Some of the Parties: Effect on Signatories.** Where a written contract is signed by some of the parties named therein, but not by all, the presumption is, that the writing took effect and was binding upon the parties who signed

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it, upon its delivery; and where one of the signatories attacks such contract on the ground it was not signed by all, the burden is upon him to show that, when he signed it, the intention and understanding was, that it should not take effect until signed by all.

2. ———: ———: ———: **Estoppel: Acceptance of Benefits.** Parties who receive and retain the full benefits accruing to them under a written instrument which they signed and delivered as their contract, cannot be heard to repudiate its obligations on the ground that it was not signed by all the parties named therein.

3. **RES ADJUDICATA: Nonsuits: Conclusiveness of Judgment.** Although a judgment of nonsuit completely terminates and disposes of the particular suit, and is final in the sense that an appeal will lie therefrom, where the nonsuit is involuntary, nevertheless it is not a final judgment on the merits nor *res adjudicata* as to the cause of action, and this is true even though, on appeal by the plaintiff, the judgment of involuntary nonsuit is affirmed by the appellate court.

4. **NONSUITS: Legal Effect: Judgments.** The legal effect of a judgment of nonsuit is that of a judgment of discontinuance or dismissal whereby the merits are left untouched.

5. **CORPORATIONS: Sale of Corporate Stock: Breach of Contract: Measure of Damages.** The measure of damages for the breach of a provision in a contract for the sale of corporate stock, that the debts of the corporation did not exceed a stipulated amount, is an amount proportioned to the amount of such indebtedness in excess of the stipulated amount, in the ratio that the number of shares so sold bears to the number of shares outstanding at the time.

6. **VERDICTS: Trial Practice: Computation of Liquidated Damages by Court: Harmless Error.** Notwithstanding Sec. 1993, R. S. 1909 provides that when a verdict shall be found for plaintiff, in an action for the recovery of money only, the jury shall assess the amount of the recovery, the giving of an instruction which directed the jury that, in the event they found for defendant upon his counterclaim seeking the recovery of money, they should find for him in a certain sum, was not reversible error, in view of Secs. 1850 and 2082, R. S. 1909, where the amount of such recovery did not exceed the amount to which defendant was entitled to recover as a matter of law, in the event the finding was for him, and interest thereon from the date of demand.

7. **INTEREST: Computation: Demand.** The institution of a suit constitutes a demand, and interest on the amount of recovery may be computed from such time.

Appeal from St. Louis City Circuit Court.—*Hon. Wilson A. Taylor,* Judge.

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AFFIRMED.

Wm. F. Fahey for appellants.

(1) The writing offered in evidence was not a contract, and was not binding upon the appellants, because it was not signed by Allen S. Cahn, an essential party thereto. 32 Cyc. 45, 46; 9 Cyc. 282; Muehlbach v. Railroad, 166 Mo. App. l. c. 310, 311; Stub v. Grimes, 38 Minn. 318, l. c. 319-320; Arnold v. Scharbauer, 116 Fed. 492; Graham v. Caperton, 57 Southern 741; Bruch v. Shafer, 45 Pa. Supt. Ct. Rep. 614, 615; James v. Darby, 100 Fed. 224; Crittenden v. Armour, 80 Iowa 221; Mathews v. Barnes, 112 Mass. 463, l. c. 446; Naylor v. Stine, 96 Minn. 59. (2) The said writing, or alleged contract, is barred by an unmodified and unreversed adverse judgment in a former suit instituted thereon. Elliott on Contracts, sec. 1985; 11 Cyc. 757; 23 Cyc. 1529; Johnson v. Railroad 243 No. l. c. 290; Coleman v. Dalton, 71 Mo. App. 14, l. c. 23; Paddock v. Railroad, 155 Mo. App. 326; Bridge Co. v. Stone, 194 Mo. 175; Spencer v. Watkins, 169 Fed. 379, l. c. 385; Truesdale v. Trust Co., 67 Minn., l. c. 460; Commissioners, etc. v. McIntosh et al., 30 Kan. 234. (3) Instruction No. 9, given at respondent's request, instructing the jury that the attachment suit was not decided by the court, was erroneous. See authorities under point 2. (4) Instruction No. 6, given at the instance of respondents, concluded with merely an abstract statement of the law, thus injecting a foreign issue in the case and confusing the jury, and thereby constituting prejudicial error. Grout v. Railroad, 151 Mo. App. 330, l. c. 333. (5) In an action for breach of contract, it is incumbent upon the party who alleges he sustained damages to prove what the damages were, and the amount thereof, and one who proves damage, but does not give any evidence to prove the amount thereof, can recover only nominal damages, if anything. Noffsinger v. Bailey, et al., 72 Mo. 216, l. c. 219; Cronan v. Stuttsman et al., 151 S. W. (Mo. App.) 166. (6) Instruction No. 8, given at respondents' request, and instructing the jury that, if their verdict be in favor of respondent Wil-

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son on his counterclaim, his damages shall be assessed in the sum of $667, was erroneous. See authorities under Point 5. (7) It is the duty of the court to construe an unambiguous writing, and adjudge its conclusions as a matter of law, without reference to the jury. Meek v. Hurst, 223 Mo. 688, 122 S. W. 1022; Donovan v. Boeck, 217 Mo. 70, 116 S. W. 543; Insurance Co. v. Wolfson, 124 Mo. App. 286, 101 S. W. 162.

Frank H. Haskins for respondent.

(1) The writing offered in evidence was a binding contract upon those who signed it. Muehlbach v. Railroad, 166 Mo. App. 305, 314; Gay v. Murphy, 134 Mo. 98, 106; State ex rel. v. Sandusky, 46 Mo. 377, 380; Cutter v. Whittemore, 10 Mass. 442. (2) The instruction or the presumption of law regarding the validity of the contract, was correct. Muehlbach v. Railroad, 166 Mo. App. 305, 314; Gay v. Murphy, 134 Mo. 98, 106; State ex rel. v. Sandusky, 46 Mo. 377, 380. (3) The execution of the contract having been submitted to the jury under proper instructions and they having found the existence of a contract the agreed statement of facts submitted showed positively and accurately the amount of damages sustained. The action of the court in computing the amount of the verdict where the amount which under the law would constitute damage is agreed upon, is not reversible error if the computation is correct. Daud v. Reid, 53 Mo. App. 553; Wells v. Zallee, 59 Mo. 509. (4) The alleged adverse judgment in a former suit was a judgment of non-suit and not a final judgment. A judgment of non-suit is not *res adjudicata*. Burns v. Marsh, 144 Mo. App. 412; Dean v. Railroad, 148 Mo. App. 428; Zeller v. Ransom, 140 Mo. App. 220.

ALLEN, J.—This is an action upon an attachment bond executed by defendants Regent Laundry Company, a corporation, and Wilson, as principals, and defendants Renard and Young, as securities, in the penal sum of $2200. Defendant Wilson interposed a counterclaim, the nature of which will be later shown. The trial, before

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the court and a jury, resulted in a verdict for plaintiffs on the bond sued upon, assessing their damages at the sum of $518.77, and in favor of defendant Wilson on his counterclaim in the sum of $667. From a judgment entered accordingly, the plaintiffs prosecute the appeal now before us.

The attachment suit, in which was given the bond here sued upon, was instituted on or about September 4, 1906, and grew out of a written agreement of date August 3, 1906, executed by these plaintiffs, Nat J. Goodman and Stella M. Goodman, the defendants Regent Laundry Company and Chas. H. Wilson, one D. L. Cahn and one B. S. Seasongood. In the writing defendant Wilson was named as the party of the first part, these plaintiffs as parties of the second part, D. L. Cahn and Ellen Cahn, his wife, as parties of the third part, Seasongood as party of the fourth part, and the defendant Regent Laundry Company, as party of the fifth part; but neither Ellen Cahn nor the Regent Laundry Company signed the instrument. This agreement provided that the party of the first part therein (Wilson) agreed to purchase from the parties of the second and third parts (these plaintiffs and Cahn and wife) thirty-five shares of the capital stock of the Regent Laundry Company agreeing to pay therefor at the rate of $125 per share, such purchase price to be paid as follows: The sum of $1850 to be paid the Mercantile Trust Company to take up a note of the Regent Laundry Company; $2200 to be paid to these plaintiffs, and the remaining $325 to be paid to Cahn and his wife. Following this the agreement contained a paragraph as follows, viz:

"And the parties of the second, third and fourth parts hereby agree and covenant with the party of the first part that with the exception of the said one thousand eight hundred fifty dollar ($1,850) note, the party of the fifth part is not indebted to any person, firm or corporation in any sum other than the current bills for the month of July, 1906, excepting perhaps $200, and they do hereby warrant that the outstanding accounts

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belonging to the party of the fifth part will at least equal said current bills for the month of July, 1906."

The agreement further provided that the plaintiffs herein would not in any way engage in the laundry business for a certain period of time within a certain prescribed territory; that they agreed to sell to Wilson twenty-five shares of the capital stock of the Regent Laundry Company at the price mentioned; and that Cahn and wife agreed to sell to Wilson ten shares of the capital stock of said company.

Though the instrument was not signed by Mrs. Cahn nor the Regent Laundry Company, it was delivered and was acted upon. It appears that defendant Wilson paid the note of the Regent Laundry Company for $1850, paid the said sum of $2200 to these plaintiffs, and the sum of $325 to Mrs. Cahn, and received the thirty-five shares of stock of the Regent Laundry Company, being one-half of that company's capital stock. Thereafter it was discovered that the Regent Laundry Company was indebted to various persons in the sum of $1154.77, exclusive of current bills for the month of July, 1916, and exclusive of the note for $1850 above mentioned. Thereupon the Regent Laundry Company and Wilson instituted against these plaintiffs and Cahn and Seasongood, the attachment suit above mentioned, as for a breach of the covenant contained in the paragraph of the aforesaid contract which we have quoted in full above. In that action there was, at the court's direction, a verdict for the defendants therein (these paintiffs) on their plea in abatement. Upon the trial on the merits, the plaintiffs therein were forced to a nonsuit, and upon the court's refusal to set the same aside they appealed to this court. On that appeal—for the reason stated in the opinion—we could review only the record proper, and finding no error therein the judgment of nonsuit entered by the circuit court was affirmed. [See Regent Laundry Co. v. Goodman, et al, 142 Mo. App. 716, 121 S. W. 1082.] Thereafter, to-wit, on November 19, 1909, the present action was instituted by these plaintiffs on the bond given in the attachment suit as stated above.

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It is unnecessary to notice the petition herein. The joint answer of defendants Renard and Young admits the execution of the bond sued upon and denies each and every other allegation of the petition. The answer of defendant Regent Laundry Company is a general denial. Defendant Charles H. Wilson interposed a general denial, coupled with a counterclaim predicated upon a breach of plaintiffs' said covenant in the contract of August 3, 1906, being the identical cause of action upon which Wilson and his codefendant Regent Laundry Company had sought a recovery against these plaintiffs in the above-mentioned attachment suit; Wilson averring that the former action, prosecuted by him and the Regent Laundry Company, resulted in a nonsuit as we have stated above.

In their reply the plaintiffs plead that in the attachment suit the ruling of the trial court, in forcing the plaintiffs therein to a nonsuit, was based upon a determination by that court that the written instrument of August 3, 1906 created no obligation in favor of defendant Wilson and his codefendant Regent Laundry Company, or either of them, against these plaintiffs; "that the subject-matter of said counterclaim has been finally adjudicated," and that defendant Wilson "is barred from further action thereon or from seeking to question said determination, finding and judgment." The reply admits that on or about August 3, 1906, defendant Wilson agreed to purchase and did purchase from plaintiffs and Cahn and wife thirty-five shares of capital stock of the Laundry Company, and paid the consideration therefor as stated above, but avers, in effect, that the alleged written instrument upon which the counterclaim is predicated never became a valid and subsisting contract binding upon plaintiffs; that it was understood and agreed, between all of the parties concerned, that the writing should be signed by all of the parties mentioned therein before becoming valid and effective; that it was in fact not signed by the Regent Laundry Company nor by Mrs. Ellen Cahn, by reason whereof it acquired no validity.

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Certain denials are made, putting in issue matters set up in the counterclaim, but they need not be here detailed.

On motion of defendant Wilson the court struck out all of that part of the reply which sought to set up the ruling and judgment in the attachment suit as a bar to the prosecution of defendant Wilson's counterclaim.

The questions before us on appeal relate entirely to the counterclaim and touching that it need only be said that there was evidence pro and con on the issue as to whether the written agreement of August 3, 1906, was signed by those who executed it, with the understanding and intention that it should not become effective unless signed by all parties named therein; and that plaintiffs' counsel, for the purposes of this case, stipulated that on August 3, 1906, the Regent Laundry Company was indebted to various persons in the sum of $1154.77, exclusive of current bills for the month of July, 1906, and exclusive of the note for $1850 mentioned in the counterclaim.

I. The first point made by learned counsel for appellant is that the written instrument upon which the counterclaim of defendant Wilson is predicated never became binding upon plaintiffs for the reason that it was never signed by Mrs. Ellen Cahn; and that the court erred in admitting the writing in evidence and in refusing to direct a verdict for plaintiffs on the counterclaim. The trial court, as appears from its rulings throughout, took the view that the writing presumptively took effect and was binding upon the parties who signed it, upon its delivery, and that the burden of proof was on plaintiffs to show that the understanding and intention of such parties were to the contrary. This is in accord with the settled law in this State as to the general rule applicable to such a situation.

In Muehlbach v. Railroad, 166 Mo. App. l. c. 314, 148 S. W. 453, it is said by JOHNSON, J.:

"The rule applicable to such cases is that a party who signs and delivers an instrument is bound by the obligations he therein assumes although it is not signed

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by all the parties named in it unless it appears that the parties signing mutually intended that it should be inchoate and incomplete and not take effect as a contract until signed by all the parties named. [State ex rel v. Sandusky, 46 Mo. 377; Donnell Mfg. Co. v. Repass, 75 Mo. App. 420; Gay v. Murphy, 134 Mo. 98; Mattoon v. Barnes, 112 Mass. 463; Dillon v. Anderson, 43 N. Y. 231; Grafeman Dairy Co. v. St. Louis Dairy Co., 96 Mo. App. 495; Naylor v. Stone, 104 N. W. (Minn.) 685; Edwards v. Gildemeister, 61 Kan. 141; American Pub. Co. v. Walker, 87 Mo. App. 503.] And the burden is on the party attacking the contract to show that when he signed it was agreed that the contract should not take effect until signed by all the parties. [Authorities, supra.]"

In State ex rel. v. Sandusky, supra, the Supreme Court, through WAGNER, J., said:

"We think that the best and most intelligible principle is, that where a writing obligatory is prepared to be signed by several and is not signed by all, whether it is the act of those who do sign it depends upon the question whether it was signed and delivered as an escrow only until signed by the others, or was delivered as the writing of the parties signing." The court expressly approved the rule announced by the Supreme Court of Massachusetts in Cutter v. Whittemore, 10 Mass. 442.

In Gay v. Murphy, supra, the bond in question had been signed by the surety merely and not by the principal; and applying a well recognized rule of law, it was held that the surety could not be held liable on the instrument; but in that connection the court said:

"The rule is different when the bond is signed by the principal and is not signed by one of the sureties named in the bond. In such cases the bond is prima facie binding on all who sign it. And if those who sign it would avoid responsibility thereon the burden rests upon them of showing that at the time of its execution it was agreed that the bond should not be delivered as their deed until all persons named in the bond as sureties had executed it."

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But in the case before us the written instrument, upon which the counterclaim is predicated, was not only delivered without Mrs. Cahn's signature, but was treated by these plaintiffs and defendant Wilson as a valid subsisting contract between them. The evidence shows that without waiting to procure the signature of Mrs. Cahn, who was unable to be present on account of sickness, plaintiffs, defendant Wilson and Cahn proceeded at once to consummate the transaction, Cahn having in his possession his wife's stock indorsed in blank. Defendant Wilson fully performed the contract on his part. Relying thereupon he paid to plaintiffs the full consideration to be paid them for their stock, and paid as well the other consideration mentioned. Plaintiffs have received and retained the full benefits accruing to them under the written instrument which they signed and delivered as their contract, and they cannot now be heard to repudiate its obligations on the ground that it was not signed by all the parties named therein. [See Muehlbach v. Railroad, supra, l. c. 314.]

We need not enter into a discussion of the authorities relied upon by appellants. Some of them are cases dealing with contracts wholly executory; and none of them are persuasive in view of the facts disclosed by this record.

It is argued, in effect, that plaintiffs would have had a remedy by way of contribution against Mrs. Cahn, had she signed, which remedy is lost by her failure to execute the instrument; and that this affords a cogent reason why the writing shoud be held to be not binding on plaintiffs. [See Mattoon v. Barnes, 112 Mass. l. c. 466; Naylor v. Stone, 96 Minn. l. c. 59.] It may be that the fact that a remedy against a party who does not sign is thus lost, will, under appropriate circumstances, be an important factor in the case, bearing upon the question as to whether the parties signing mutually understood and intended that the instrument should be inchoate and incomplete, and ineffective as a contract, until signed by all the parties named. [Muehlbach v. Railroad, supra.] But be this as it may, what influence, if any, this factor

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may have in a given case must of necessity depend upon the circumstances surrounding the transaction. In the instant case it appears quite clear that this feature is without material influence. Certainly, in the face of the facts above stated, it would not warrant the court in declaring, as a matter of law, that the contract did not become binding upon those who signed it.

II. Appellants insist, however, that the ruling and judgment in the attachment suit operates as a bar to the prosecution by respondent Wilson of the cause of action upon which his counterclaim is founded, and therefore the court erred in striking out that portion of plaintiffs' reply by which it was attempted to plead the same in bar. There is no merit in this contention. The judgment entered in the attachment case was one of nonsuit. Though the nonsuit was involuntary, and the plaintiffs in that action moved to set it aside, and, upon such motion being overrulued appealed, and the appellate court affirmed the judgment, such judgment was none the less one of nonsuit merely. [Mason v. K. C. Belt Ry. Co., 226 Mo. 212, 125 S. W. 1128.] Its legal effect is that of a "judgment of discontinuance or dismissal whereby the merits are left untouched." [Wetmore v. Crouch, 188 Mo. l. c. 654, 87 S. W. 954.] A judgment of nonsuit, though it completely terminates and disposes of the particular suit, and is final in the sense that an appeal will lie therefrom where the nonsuit is involuntary, is not a final judgment upon the merits nor *res adjudicata* as to the cause of action. The cause of action is not merged in a judgment of this character, as in a final judgment on the merits, but survives and may be further prosecuted within the time allowed by law. [See Mason v. K. C. Belt R. Co., supra; Hewitt v. Steele, 136 Mo. 327, 38 S. W. 82; Withaupt v. City of St. Louis, 158 Mo. 655, 59 S. W. 960; Manning v. Insurance Co., 176 Mo. App. 678, 159 S. W. 750; Woods v. Mo. Pac. Ry. Co., 192 Mo. App. 165, 179 S. W. 727.] The ground upon which the court trying the attachment suit gave the peremptory instruction forcing the plaintiffs therein to a nonsuit, is not here a

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matter of consequence. We are concerned only with the fact that the judgment entered was one of nonsuit, operating as a discontinuance or dismissal of that particular action.

III. The court instructed the jury that if they found for defendant Wilson on his counterclaim to assess his damages at the sum of $667. Appellants argue that the giving of this instruction constituted reversible error.

In the first place, it is appellants' contention that defendant Wilson did not prove that he suffered any damage by reason of the alleged breach by plaintiffs of the covenant counted upon in the counterclaim, and could, at most, recover nominal damages only. The argument is that Wilson failed to affirmatively show that the stock which he purchased on August 3, 1906, was owned by him at the time when the debts of the Regent Laundry Company—in excess of the sum mentioned in the contract as being the total indebtedness of the company—were paid, or when the suit was brought. But the fact is that Wilson, in conformity to the terms of the contract, acquired one-half of the stock of the corporation, and that the said covenant of plaintiffs was broken immediately when made; and the presumptions thus afforded suffice to sustain a recovery of substantial damages. And we take it that, prima facie, defendant Wilson, having purchased one-half of the capital stock of the corporation, is to be regarded as having been damaged to the extent of one-half of the amount by which the corporation's indebtedness exceeded that which plaintiffs covenanted that it would be found to be. Presumptively the value of Wilson's stock was less by one-half of this additional indebtedness than it would have been had such additional indebtedness not existed.

But it is argued that in any event the court erred in directing the jury to return a verdict for plaintiff for a definite sum, thereby depriving the jury of the right to assess the damages. It is true that Section 1993, Revised Statutes 1909, provides that "when a verdict shall

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be found for the plaintiff in an action for the recovery of money only, the jury shall also assess amount of the recovery." Adjudged by some of the earlier decisions in this State, applying to this statute, the giving of this instruction would constitute fatal error; though in Wells v. Zallee, 59 Mo. 509, a suit on a promisory note it was held that the giving of an instruction directing the jury as to what amount to allow if they found for plaintiff, was not reversible error, the amount being correcty calculated; which ruling was followed in Doud v. Reid, 53 Mo. App. 553. However, in the recent case of Beekman Lumber Co. v. Acme Harvester Company, 215 Mo. 221, l. c. 251, 114 S. W. 1087, the giving of an instruction directing the amount of a verdict on an account, including interest calculated and added to the amount due on account, was held not to be fatal error notwithstanding the above statute, since it appeared that the items of the account were not disputed, and the interest had been properly calculated. In disposing of the matter the court invoked section 2082, Revised Statutes 1909, which commands that an appellate court shall not reverse a judgment unless it believe that error was committed against the appelant or plaintiffs in error, materially affecting the merits of action. We followed this ruling in McCormick Machine Co. v. Blair, 181 Mo. App. 593, 164 S. W. 656, and in Moore v. McHaney, 191 Mo. App. l. c. 698, 178 S. W. 258.

In the case before us, it is admitted that on August 3, 1906, the Regent Laundry Company was indebted to various persons in the sum of $1154.77, exclusive of current bills for the month of July, 1906, and exclusive of the note for $1850 mentioned. Deducting from the $1154.77 the sum of $200, in accordance with the terms of the paragraph of the contract above quoted, one-half of the remainder, to-wit, $477.38, will constitute Wilson's damages, exclusive of interest, under the rule stated above. The institution of the attachment suit, September 4, 1916, constituted a demand by Wilson; and if interest be computed on $477.38 from said date to the date of the trial below, and added to said sum, the to-

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tal will be found to be a little more than $667, the amount of the verdict on the counterclaim under this instruction. The action of the court therefore in thus directing the amount for which the jury should return a verdict, on the counterclaim, if for defendant Wilson, cannot be said to be error materially affecting the merits of the action (section 2082, supra), or affecting the substantial rights of appellants (see Sec. 1850, Rev. Stat. 1909).

IV. Other questions raised respecting the instructions given are either disposed of by what we have said above or are not such as to warrant discussion..

The judgment is affirmed. *Reynolds, P. J.*, and *Thompson, J.*, concur.

N. L. VAN ZANDT, Respondent, v. ST. LOUIS WHOLESALE GROCER COMPANY, Appellant.

St. Louis Court of Appeals. Argued and Submitted November 13, 1916. Opinion Filed December 30, 1916.

1. **PLEADING: Sufficiency of Petition: Manner of Questioning.** Defects in a petition are not ordinarily reached by a motion for a new trial, but are reached either by an objection to the introduction of any evidence, by demurrer, or motion in arrest, and, failing these, may be reached and raised, in some cases, even for the first time, in the appellate court.

2. **CORPORATIONS: Promotion Work: Assumption of Liability by Corporation: Sufficiency of Petition.** A petition in *quantum meruit* alleged that defendant corporation was a domestic corporation engaged in the wholesale grocery business; that, prior to its organization, the individual defendants were seeking to organize, among retail grocers, a corporation to engage in the wholesale grocery business on the co-operative plan; that, at their special request, plaintiff undertook to organize and promote defendant corporation among retail grocers, and to explain the plan to them and to secure their patronage and subscriptions to its stock, and that he attended to its preliminary organization, so that it was incorporated and that it thereafter engaged in the wholesale grocery business, the individual defendants being its officers; that defendant corporation approved and accepted plaintiff's services

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and assumed liability therefor, and promised to pay him the reasonable value of his services and expenses, which is $10,000, but that defendants now refuse to pay plaintiff that sum, or any part thereof, except $1700 heretofore paid to him by them. *Held*, that the petition states a cause of action.

3. ———: ———: ———: **Instructions.** In such case, the court instructed the jury, at the instance of plaintiff, that if they found there was an implied promise by the promoters, by acceptance of the services of plaintiff in the organization of the corporation, and if they found that the corporation accepted the organization and promotion work and service in its behalf and that plaintiff continued soliciting subscriptions to its stock and completed its organization, defendants were liable for the reasonable value of such services, not exceeding $10,000, and his expenses, deducting therefrom $1700 already paid him. *Held*, that, in view of the fact that the evidence was conflicting as to what the $1700 was paid for, plaintiff claiming that it was a payment on account, while the evidence for defendants tended to show that it was paid as commission on the sales of stock made by plaintiff and as full payment for his services, the instruction was erroneous, as assuming that plaintiff's version of the transaction was correct. *Held, further*, that the instruction was erroneous for allowing a recovery for expenses incurred by plaintiff, in the absence of any evidence tending to prove the amount of such expenses, and when, in fact, plaintiff admitted that his expenses had been paid. *Held, further*, that, in view of the fact that the instruction purported to cover the whole case, it was erroneous, as entirely omitting any reference to the defenses pleaded and in evidence.

4. **INSTRUCTIONS: Assuming Controverted Facts.** An instruction which assumes a controverted fact to be true is erroneous.

5. ———: **Submitting Theory not Proved.** An instruction which submits facts that are not proved is erroneous.

6. ———: **Failure to Submit Defenses.** An instruction for plaintiff which purports to cover the whole case is erroneous, if it omits any reference to the defenses pleaded and in evidence.

7. **EVIDENCE: Burden of Proof.** A party having the *onus* must produce substantial evidence tending to establish his claim, in order to warrant a submission of the case to the jury; and the duty to establish the same by a preponderance of the evidence also rests upon him, the degree of preponderance, however, being immaterial.

8. **CORPORATIONS: Promotion Work: Authority of Promoters.** In an action on a *quantum meruit* against a corporation, for services in promoting and organizing the corporation and selling its stock, *held* that the parties with whom plaintiff claimed to have made his original contract for services, who were holding themselves

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out as officers of the corporation before it was organized, were no more the corporation than was plaintiff himself, but they were all mere promoters.

9. ———: ———: **Liability of Corporation.** As a general rule, a corporation is not liable for services rendered by a promoter, though there are cases holding that the promoter may recover for such services, where it appears that he expected to be compensated therefor, that the services were renered at the request of, or under contract with, the associate promoters, or a majority of them, and where the acts done were necessary to the organization and its objects and the corporation received and enjoyed the benefits.

10. **QUANTUM MERIUT: Necessity of Proving Value of Services.** In an action on a *quantum meruit*, a recovery cannot be had unless plaintiff proves the reasonable value of the services sued for.

11. **CORPORATIONS: Promotion Work: Implied Acceptance.** A corporation does not, by the mere act of becoming a corporate body, accept the benefit of a promoter's services in obtaining subscriptions to its capital stock.

12. ———: ———: **Assumption of Liability.** In an action on a *quantum meruit* against a corporation, for services in promoting and organizing the corporation and selling its stock, *held* that plaintiff failed to prove the value of his services; that the promoters, who are alleged to have employed plaintiff, were not a majority of the promoters; that the testimony adduced by plaintiff was entirely too indefinite to constitute substantial testimony to the effect that such parties availed themselves of plaintiff's services with any sort of understanding that he was to receive compensation from the corporation, when organized; and that, after the corporation was organized, its directors refused to recognize or affirm plaintiff's claim; and hence it is *held* that plaintiff's evidence was insufficient to warrant submission of the case to the jury.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin,* Judge.

REVERSED.

Collins, Barker & Britton, Boaz B. Watkins and *C. E. Kimball, Jr.* for appellant.

(1) The motion of defendant, St. Louis Wholesale Grocer Company, for a new trial on the ground that the second count of plaintiff's petition does not state facts

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sufficient to constitute a cause of action, should have been sustained. New York & New Haven Railroad Co. v. Ketchum, 27 Conn. 179; 10 Cyc. 265; Thompson on Corporations (2 Ed.), sec. 88; Cushion Heel Shoe Co. v. Hartt, 103 N. E. (Sup. Ct. of Ind.), 1063; R. I. & St. L. Rd. Co. v. Sage, 65 Ill. 328; Hayward v. Lessen, 175 Mass. 320; Van Noy v. Ins. Co., 168 Mo. App. 287; Blackwell v. Adams, 28 Mo. App. 61; Davis v. Creamery Assn., 63 Mo. App. 477. (2) Promoters stand in a fiduciary relation toward a projected corporation. Brooker v. Trust Co., 254 Mo. 156; Yale Gas Stove Co. v. Wilcox, 25 L. R. A. 90; Hayward v. Lessen, 49 L. R. A. (Mass.) 725. (a) This relation extends to a corporation as a legal entity. South Joplin Land Company v. Case, 104 Mo. 572-578; Exter v. Sawyer, 140 Mo. 302; Chandler v. Bacon, 30 Fed. 538. (b) It extends also toward the stockholders in respect to their property right. Brooker v. Trust Co., 254 Mo. 156; Cushion Heel Shoe Co. v. Hartt, 103 N. E. 1063. (2) The law is well settled that contracts made for a projected corporation by its promoters, are not binding upon it. Van Noy v. Ins. Co., 168 Mo. App. 287; States ex rel v. Bank, 197 Mo. 574; Davis & Rankin v. Creamery Assn., 63 Mo. App. 477; Hill v. Gould, 129 Mo. 106. (3) There was no consideration for the alleged promise to pay for the services rendered by the promoter. Furniture Co. v. Crawford, 127 Mo. 364; Contracting Company v. Construction Company, 150 Mo. App. 505. (4) There is no allegation in the petition that plaintiff disclosed to prospective subscribers to stock that he was to receive any personal profit. Exter v. Sawyer, 146 Mo. 302; Garrett v. Kansas City Coal Mining Co., 113 Mo. 330; Brooker v. Trust Company, 254 Mo. 157; South Joplin Land Company v. Case. 104 Mo. 572-578; Pitts v. Steele Mercantile Co., 75 Mo. App. 231. (5) Defendant St. Louis Wholesale Grocer Company's demurrer to the evidence at the close of the plaintiff's case should have been sustained. (a) There was no evidence introduced to show that the services rendered by the paintiff were worth more than $1700. Bradner

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v. Rockdale Powder Co., 115 Mo. App. 102. Also cited with approval in Woodward v. Donnell, 146 Mo. App. 119. (b) There was no evidence to show that the defendant, St. Louis Wholesale Grocer Company, contracted or agreed to pay a reasonable value for plaintiff's services, but proof to the contrary tends to show a contract for one-half of one per cent. of the gross sales of the defendant company during a period of five years, which constitute a variance between allegation and proof. (6) While the appellate court will not ordinarily disturb the verdict of the jury on the question of the weight of the evidence, it will not hesitate to do so when the verdict is not supported by the evidence. Lyons v. Corder, 253 Mo. 539, 561; Graney v. St. Louis, I. M. & S. Ry. Co., 157 Mo. 222; Powell v. Mo. Pac. Ry. Co., 76 Mo. 84; McFarland v. Accident Assn., 124 Mo. 222; O'Donnell v. Railroad, 152 Mo. App. 614; Fitzjohn v. Transit Co., 183 Mo. 78; Knisely v. Leathe, 178 S. W. 461; College v. Dockery, 241 Mo. 522. (7) The court erred in granting plaintiff's instruction number two; this for the reason that instruction assumes material and controverted facts. Comer v. Taylor, 82 Mo. 341. (a) The instruction unduly and improperly emphasizes the erroneous theory that the $1700 paid plaintiff was not paid for services and expenses, but for expenses alone or even a part payment for expenses. (b) The instruction ignores the pleading and uncontroverted evidence of the plaintiff himself, that his expenses were paid for in full and instructs the jury that they may find additional expenses as part of the plaintiff's damage. (c) The instruction ignores the defendant St. Louis Wholesale Grocer Company's defense and does not cover all the issues raised by the pleadings. Holmes v. Board of Trade of K. C., 81 Mo. App. 143; Moyes v. Railroad Company, ——Mo.——(not yet officially reported).

Emerson E. Schnepp for respondent.

(1) When a number of persons not incorporated, but associated for a common object, intending to pro-

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cure a charter, authorizes acts to be done in furtherance of their object by one of their number or a third person, with the understanding that he should be compensated, if such acts were necessary to the organization and its objects, and are accepted by the corporation and the benefits enjoyed, they must be taken *cum oncre* and be compensated for. Taussig v. St. Louis & Kirkwood Ry. Co., 166 Mo. 28, 38; Railroad v. Christy, 79 Pa. St. 54, 59; Girard v. Case Bros. Cutlery Co., 225 Penn. St. 327, 333; Farmers' Bank of Vine Grove v. Smith, 105 Ky. 816, 820; Low v. Railroad, 45 N. H. 377-378; Railroad v. Perry, 37 Ark. 164, 187; Hall v. Vt. & Mass. R. Co., 28 Vt. 401, 407; Thompson on Corporations, (2 Ed.), secs. 89, 92; Taussig v. Railroad, 186 Mo. 269, 276, 277. (2) The assignment of error that there is no evidence to show that plaintiff's services were worth more than $1700 is without merit. Seyers v. Craven, 107 Mo. App. 407; 40 Cyc. p. 2855; Ferris v. Edmondson, 124 Mo. App. 94; Alden v. Gross, 25 Mo. App. 123; Floerke v. Teuscher Distilling Co., 20 Mo. App. 76. (3.) There is no error in plaintiff's instruction No. 2, and this form has been approved by the Supreme Court. Taussig v. Railroad, 186 Mo. 269, 277.

REYNOLDS, P. J.—Plaintiff commenced his action against the defendant and three individuals.

The petition contained two counts, the first count sounding in damages for breach of an express contract of employment. As there was a verdict and judgment for the defendant on that count, and plaintiff has not appealed, it is unnecessary to set out that count in full, but we will hereafter have occasion to refer to it.

The second count avers that the defendant St. Louis Wholesale Grocer Company, is a corporation organized and existing under and by virtue of the laws of this State, engaged in the wholesale grocery business; that on January 1, 1911, and thereafter, the defendants Kelly, Lukenbill and Vandeloecht were seeking to organize among retail grocers a corporation on the co-operative

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plan for the purpose of engaging in the wholesale grocery business in the city of St. Louis, to be known as the St. Louis Wholesale Grocer Company; that at the special instance and request of the defendant, plaintiff undertook the work of organizing and promoting that company among the retail grocers of St. Louis and the surrounding country of Illinois and Missouri; that beginning on or about January 1, 1912, and at the special instance and request of defendants (meaning the individual defendants), plaintiff began to and did visit the retail grocers in St. Louis, throughout central and southern Illinois, eastern and southern Missouri, and all other territory contiguous to St. Louis; that he explained the co-operative plan of the proposed company to the retail grocers, secured their patronage and good will and solicited and procured their subscriptions to stock in the company defendant, attended the preliminary organization and meetings of that company, frequently consulted with and advised the officers thereof, of which preliminary organization the defendant Kelly was president, defendant Lukenbill secretary, and defendant Vandeloecht treasurer, and that plaintiff did all things needed and necessary for the complete organization of the corporation, so that in February, 1912, by reason of the work and services of plaintiff as above set out, the St. Louis Wholesale Grocer Company was incorporated under the laws of Missouri with a capital stock of $50,000, one-half fully paid, and at once engaged in the wholesale grocery business in the city of St. Louis, and at the time of the institution of this action, was and is engaged in that business. It is further averred that the defendant Kelly was and is the president of the corporation, and the defendant Vandeloecht was and is its treasurer, and that the defendant Lukenbill and the two individual defendants above named, were and are three members of its board of directors. It is further averred that immediately after its organization, the St. Louis Wholesale Grocer Company, hereafter for brevity called the corporation or company defendant, "approved of and accepted all the work and services of plaintiff

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in the promotion and organization of said corporation as aforesaid, assumed all liability therefor, and the payment to plaintiff of the reasonable value thereof; that thereafter under the directions and approval of defendant corporation, plaintiff continued the work of soliciting and procuring subscriptions for the capital stock of said company as aforesaid until about May 7, 1912." Plaintiff then avers "that he devoted all of his time from January 1, 1911, to about May 7, 1912, and his best efforts to the aforesaid work; that he has paid all his expenses of every kind during said time; that defendants promised to pay him the reasonable value of said services so performed as aforesaid, and his expenses, which is $10,000," but that defendants now refuse to pay plaintiff that sum or any part thereof except $1700 heretofore paid to him by them. Judgment is demanded in the sum of $8300 with costs.

The defendant corporation, answering this second count of the petition, admits that the defendant, at the date of the filing of the petition in the case, was a corporation organized and incorporated and with the capital stock averred; admits that Kelly was its president, Vandeloecht its treasurer, and Kelly, Vandeloecht and Lukenbill, three members of its board of directors immediately after its incorporation; admits that plaintiff received $1700, but denies that that sum was received by plaintiff in the manner or pursuant to the contract or agreement, as alleged in plaintiff's petition, but alleges that that sum was paid to and accepted by plaintiff in full for all services, if any, rendered by plaintiff to the defendant corporation or to the other defendants, and in full for any and all matters relating in any way to any and every understanding or agreement, if any, which plaintiff might have had with the defendants Kelly, Lukenbill and Vandeloecht, or with the defendant corporation.

As a further answer and defense to this second count of the petition, the defendant corporation says that it believes, and therefore alleges as a fact, that plaintiff had no such agreement with the defendants

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Kelly, Lukenbill and Vandeloecht as in plaintiff's second count of his petition is alleged, and this defendant specifically denies that immediately after its incorporation, or at any other time, it approved, accepted and assumed liability, or any liability for and payment to plaintiff under the alleged agreement set out in the petition, or under any other agreement. The defendant corporation further specifically denies that after its incorporation, plaintiff worked for it in soliciting subscriptions for its capital stock under the terms of the alleged contract or agreement.

For further answer and defense to this second count, the corporation defendant alleges that there was no consideration to support the alleged approval, acceptance and assumption of all or any liability by this corporation defendant to plaintiff for and on account of the alleged agreement set out by plaintiff, specifically denying that this defendant approved, accepted or assumed any liability on account of the alleged contract or agreement, and avers that the alleged approval, acceptance and assumption is void and of no binding effect.

The defendant corporation further avers that plaintiff has been fully paid for any and all alleged services and expenses, alleged and set out in his petition, and that this defendant is in no way indebted to plaintiff, specifically denying that any services were rendered or expenses incurred by plaintiff under the alleged contract or agreement, and denying that there was such a contract or agreement. Then follows a general denial of all and singular the other allegations in the petition.

There was a trial before the court and a jury. We will notice the evidence, as far as necessary, hereafter. At the close of the plaintiff's evidence in chief and again at the close of all the evidence, the defendant interposed demurrers, which were overruled. There was a verdict in favor of all the defendants on the first count of the petition, as before noted, and in favor of the individual defendants, but against the defendant St. Louis Wholesale Grocer Company for $2000 on the second

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count. Judgment followed accordingly, and the corporation defendant filing its motion for a new trial, as also one in arrest, and these being overruled and exceptions saved, the Wholesale Grocer Company has duly appealed.

There are three specifications of error made by the learned counsel for appellant, these again subdivided.

Under the first specification of error an attack is made on the second count of the petition, which attack may be summarized as urging that that count, by reason of omission of various averments, fails to state a cause of action, and it is urged that for this reason the motion for a new trial should have been sustained. We might dispose of this by saying that defects in a pleading are not ordinarily reached by a motion for new trial. They are reached either by objection to receipt of any evidence, or by demurrer, or by motion in arrest. Failing these, they may even be reached and raised, in some cases, even for the first time in the appellate court. But, considering this point as if properly made, we think this second count of the petition not obnoxious to any of the objections made to it. It does state a cause of action.

The second assignment or specification of error is that the demurrer to the evidence, interposed by the defendant grocer company at the close of the case, should have been sustained. However that may be, that defendant did not stand on this demurrer but introduced evidence of its own and plaintiff endeavored to meet this by rebutting evidence. As, however, the defendant demurred to the evidence at the close of the case and raises it here, we may assume that the points made under this second assignment are intended to cover the issue raised by that demurrer and we will presently consider it.

The third assignment of error is that the court erred in giving plaintiff's instruction which was directed to this second count of the petition. It is complained of that instruction that it assumes material and controverted facts, unduly and improperly emphasizes the erroneous theory that the $1700 paid to plaintiff was not paid for

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services and expenses but for expenses alone, or even a part payment for expenses; that it ignores the complete and uncontroverted evidence of plaintiff himself that his expenses were paid for in full, and instructs the jury that they may find additional expenses as part of the plaintiff's damage, and that it ignores the defenses of the Wholesale Grocer Company, and while purporting to cover the whole case, does not cover all the issues raised by the pleadings. That instruction is very long and it will serve no useful purpose to set it out in detail. It is to be said of it, however, that it is certainly open to the objection urged as to that part of it which covers the payment of the $1700. Referring to that part of the instruction here challenged, after telling the jury that if they found there was an implied promise by the promoters, by acceptance of the services of plaintiff in the organization of the company, it proceeds to instruct the jury that if they find that the corporation accepted the organization and promotion work and services in its behalf and that plaintiff continued the services of soliciting subscriptions for stock, "fully completing the aforesaid organization of defendant corporation until on or about May 7, 1912, then all the defendants are liable to plaintiff for the reasonable value of the aforesaid organization and promotion services rendered by him, and you should assess his damages at such sum, not exceeding $10,000, as you may believe from the evidence such services were reasonably worth *and his expenses,* deducting therefrom $1,700 already paid him and adding thereto interest at six per cent. per annum from the date of the institution of this suit, September 20, 1912, to the present time." The words we have italicized are those particularly attacked.

The evidence as to what this $1700 was paid for may be said to be conflicting, it being claimed on the part of plaintiff that this $1700 was a general payment to him on account of services, while on the part of defendant the evidence tended to show that it was paid him as his commission on the sale of stock in the defendant corporation and that under the contract between plaintiff and the

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defendant corporation or its promoters, plaintiff was to pay his own expenses as well as render his services for this $1700, that is he was to receive $8 out of every $25 collected on subscriptions in the city of St. Louis, and $10 on all such subscriptions received outside of St. Louis, and that the difference in these amounts, that is the difference between the eight and ten dollars made between the city and country work, was with the express purpose of covering expenses necessarily incurred outside of the city. In point of fact plaintiff himself testified that the eight and ten dollars he was to receive on stock subscriptions obtained by him were to cover his expenses, he however claiming that these amounts were not to cover his services, and that he had never rendered any account for expenses to either the promoters or to the company. Furthermore, plaintiff himself admitted that all his expenses have been paid. This part of the instruction was error. It is also erroneous in that there is no evidence even tending to prove what expenses plaintiff was put to or had paid. It is further erroneous in that, while purporting to cover the whole case, it entirely omits any reference to the defense of the company and the individual defendants either as pleaded or in evidence. For these errors in this instruction the judgment would have to be reversed, but as our decision will be placed on another proposition, going to the root of the case, we do not discuss this instruction any further.

This brings us to a consideration of the demurrer to the evidence. It will be noticed that this second count of the petition is apparently based entirely upon *quantum meruit* and not upon express contract. The first count of the petition was founded on the breach of a specific contract. On that issue the jury found in favor of all of the defendants and against plaintiff.

A very careful reading of all of the testimony fails to convince us that plaintiff made out any case entitling him to go to the jury on this second count of his petition.

It appears from the evidence in the case that plaintiff had been engaged in cities other than St. Louis in

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organizing retail grocers into a company from which they, as members of the corporation, would obtain their merchandise, in a way a wholesale house, which would give the stockholders owning it the opportunity of buying direct without the intervention of a third party and in that way effect a saving to them in the cost of the merchandise. Plaintiff came to St. Louis and through the intervention of an attorney obtained permission to address the Retail Grocers' Association of St. Louis, an unincorporated body made up of grocers in that city and possibly of other merchants not exclusively in the grocery business, and at a meeting of that association asked permission to present his scheme. This permission was granted and plaintiff, with his attorney, attended a meeting of the Retail Grocers' Association held in December, 1910, and laid before that body his scheme, which was to organize a corporation made up of retail grocers with a capitalization of $150,000, the stockholders and subscribers to it being confined to retail grocers, the shares in it to be $50 a share, the subscribers to take five shares each, no one subscriber to take more than five shares and each subscriber, at the time of his subscription, to pay in ten per cent. of that amount, that is $25, out of which plaintiff was to receive as commission and as covering all of his expenses $10 on each subscription so made and paid and one-half of one per cent. on the gross sales of the corporation for a period of five years after it was organized. The proposition as made to the Retail Grocers' Association at this first meeting was not acted upon. After the meeting adjourned, however, a number of the gentlemen who had been at the meeting, as we gather some twenty or more of them, possibly, adjourned to a neighboring cafe or saloon and discussed the matter further with plaintiff. The proposition, according to plaintiff, was favorably considered by these gentlemen, among those present being the defendants Lukenbill and Vandeloecht, Mr. Kelly, however, not being present, and it was proposed that a temporary organization be formed for the promotion of the plan. According to the testimony of the defendants and of several other witnesses

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who were present at this meeting in the cafe, however, plaintiff was distinctly told that that part of his plan which contemplated the payment of one-half of one per cent. on gross sales for a period of five years would not be entertained. There was evidence tending to show that this objection to the plan had been made by several of the gentlemen at the meeting of the Retail Grocers' Association. At all events, at this first meeting in the cafe nothing very definite appears to have been agreed upon. About two weeks after that there was another meeting of the Retail Grocers' Association at which plaintiff was present and again presented his plan. As all of the witnesses for defendants testified, the Retail Grocers' Association, as a body, turned down the proposition, and refused, as a body, to have anything to do with it. According to plaintiff's testimony there was no formal action taken at that meeting, but he does not claim that his plan was accepted by the Retail Grocers' Association. At all events, after this second meeting of the Retail Grocers' Association a number of the gentlemen, who were members of that association and had attended the meeting, again accompanied plaintiff to the cafe or saloon in the neighborhood and took up with him his proposition. According to plaintiff, he again stated that if they accepted his proposition for the promotion and organization of the proposed corporation that he was to receive $10 on each $25 paid on subscriptions which he secured to stock, and one-half of one per cent. on the gross sales of the proposed corporation for a period of five years. Each of the individual defendants and practically every other witness in the case testifies that this last part of the proposition, that is the part for the payment of one-half of one per cent. of the gross sales, was absolutely and unequivocally rejected. These promoters, as we may call them for brevity, meaning by that the individual defendants and the others associated with them in the preliminary negotiations and plans, did agree, however, to go into a corporation as proposed by plaintiff, he to solicit stockholders or members for it and all parties finally agreeing, according to the individual de-

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fendants and their witnesses, that for his services, expenses, and labors in connection with soliciting subscriptions to the capital stock of the proposed corporation plaintiff was to receive $8 on each $25 collected in the city of St. Louis and $10 for each subscription secured by him outside of the city of St. Louis. There was evidence to the effect that in these meetings in the cafe and at other places afterwards, some of the gentlemen with whom plaintiff was negotiating had distinctly asked plaintiff if he was still adhering to his claim of receiving one-half of one per cent. on gross sales, and that plaintiff told them that that part of the plan had been abandoned and that his compensation as covering his services and expenses was to be $8 in the city and $10 in the country on each subscriber obtained by him. After an unsuccessful effort to obtain subscribers in the city to the number expected, in point of fact only about twenty having been there obtained, plaintiff succeeded in obtaining subscriptions outside of St. Louis from about one hundred twenty-seven stockholders, a total of one hundred forty-seven, according to the exhibit of names introduced by plaintiff. Up to this time it was contemplated by all the parties that a corporation with a capitalization of $150,000 was to be organized, $75,000 to be common stock and $75,000 to be preferred stock, and there is evidence that plaintiff had assured the promoters that he would be able from his past experience to obtain the necessary subscriptions to this $150,000 proposed corporation in about six months. After the plaintiff had been at work for some sixteen or seventeen months, he succeeded in securing subscriptions to the amount of only $36,500, whereupon the promoters concluded to abandon the effort to raise $150,000 capital, and in March, 1912, organized and incorporated the defendant corporation on a capital of $50,000, $25,000 paid in cash. To enable plaintiff to solicit subscriptions and at his suggestion, the promoters, how many of them is not clear, but apparently ten or more, who had agreed to go into the matter, and apparently also on the suggestion of plaintiff, organized themselves into what they

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called a "paper association" and elected what they called "paper officers," of whom the defendant Kelly was elected president, Vandeloecht, treasurer, and Lukenbill, secretary, and at plaintiff's suggestion, in March, 1911, he was given a paper reading thus:

"M. Kelly, Jr., President. H. Vandeloecht, Treasurer.
St. Louis Wholesale Grocer Company.
Office of
J. D. Lukenbill, Secretary.
3866-68 Folsom Ave.
St. Louis, Mo., March 8, 1911.

To Whom It May Concern:

We are organizing a wholesale grocer house in St. Louis to be owned and controlled by retail grocer stockholders of Missouri and Illinois.

This will introduce Mr. N. L. Van Zandt, who is our authorized representative, to explain the proposition fully and to solicit your membership, and collect the first payment, 10 per cent of subscribed stock $25. Check to be made payable to H. Vandeloecht, Treas.

Yours respectfully,
M. KELLY, JR.,
President..

Countersigned:
J. D. LUKENBILL, Secretary."

Plaintiff was also furnished with a form of receipt to be given to those persons who subscribed to the stock, as follows:

"M. Kelly, Jr., President. J. D. Lukenbill, Secretary.
H. Vandeloecht, Treasurer.
St. Louis Wholesale Grocer Co.
St. Louis, Mo.
Capital Stock $150,000.00.
$75,000 common. Fully paid. $75,000 preferred.
Shares $50.00 each.
————hereby subscribe for five (5) shares common stock in the St. Louis Wholesale Grocer Co., pay-

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able $5 per share now, and balance, $45 per share, when ready to begin business.

Make checks payable to H. Vandeloecht, Treasurer.

Received of ——————$25, being first payment of five (5) shares of common stock in the St. Louis Wholesale Grocer Co., payable $5 per share now, and balance, $45 per share, when ready to begin business.

ST. LOUIS WHOLESALE GROCER CO.,
St. Louis, Mo.

By——————
Authorized Representative."

As before stated, while plaintiff commenced his work in January, 1911, the capital with which to start the $50,000 corporation, that is to say the defendant St. Louis Wholesale Grocer Company, was not secured until March, 1912. The corporation thereupon commenced business about March 15, 1912, and continued in business for a year, when it sold out to another concern, some of the stockholders in the old company becoming stockholders in the purchasing company. During this year of its existence, the gross sales of the corporation amounted to $176,270.94. The promoters' organization, or "paper organization" had continued and plaintiff worked under their direction in soliciting subscriptions to the stock, apparently until the organization and incorporation of the defendant corporation in March, 1912. The corporation was organized with thirteen directors, of whom the defendant Kelly was one and the president, Lukenbill another and treasurer, and Vandeloecht, a director. Who the remaining ten directors were does not appear. After the organization of the corporation, the plaintiff having been paid $1700, as he says "on general account for services and expenses," but according to the defendants and all witnesses testifying for them, "in full for all his services in the promotion of the company," plaintiff asked one or more of the members of the board of directors of the corporation defendant to present his claim

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to the board "for additional compensation." Whether he asked that of the corporation on the basis of one-half of one per cent. of the gross sales, or for what amount, in no manner appears. This was at the very beginning of its legal organization and commencement of business by the corporation. The claim of plaintiff for compensation in addition to the $1700, then being presented to the board of directors, plaintiff himself being present, the board of directors declined to make any further payments to him, denying that plaintiff was entitled to any compensation beyond what he had earned and received on sales of stock, and claiming that he had been paid in full in accordance with the understanding for all services that he had rendered and that the corporation owed him nothing.

There was no evidence of the amount of expenditures of plaintiff, beyond his statement that in going from town to town he paid his railroad fare and hotel bills. How much these amounted to, does not appear, nor was there any evidence offered or introduced as to the value of the services on his promotion work.

While this is but a summary of a mass of testimony, we think it is a substantially correct statement of the evidence in the case. It must be borne in mind that when evidence was offered and introduced, both counts of the petition were before the court and jury and the court instructed on both.

The verdict on the first count, which sounded in damages for breach of a specific contract, as before noted, was in favor of all the defendants, both the individuals and the corporation, and the verdict against the corporation rests entirely upon the second count—that seeking recovery as on *quantum meruit*. We are concerned with the second count alone.

We are therefore to determine whether on that evidence plaintiff made out his claim for compensation under the second count.

As is said by the supreme Court of Arkansas in Little Rock & Ft. Smith R. R. Co. v. Perry, 37 Ark. 164,

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l. c. 194, "It is certainly the duty of the party having the *onus* to produce a preponderance of proof, otherwise matters should stand as they are. The degree of preponderance is immaterial, but there must be *some,* of which the jury should judge." We refer to this case because it is cited on another proposition by the learned counsel for the respondent. Our Missouri decisions are to the same effect; that is, there must be substantial evidence on the part of the plaintiff, tending to establish the claim which he makes, to justify and warrant the court in submitting the case to the determination of the jury. In the case at bar, we find no such substantial evidence as justifies a verdict against the dedefendant corporation on the second count.

Learned counsel for respondent placed great reliance upon the decisions of our Supreme Court in Taussig v. St. Louis & Kirkwood Ry. Co., 166 Mo. 28, 65 S. W. 969, and Taussig v. St. Louis & Kirkwood R. R. Co., 186 Mo. 269, 85 S. W. 378, as also, among others, on Little Rock & Ft. Smith R. R. Co. v. Perry, supra, and Bell's Gap R. R. Co. v. Christy, 79 Pa. St. 54. On their facts we find no analogy between these cases and that at bar. In the first place, the parties with whom plaintiff claims to have made his original bargain were no more the corporation than was plaintiff himself. They were all mere promoters. Paraphrasing what is said by Judge GRAVES in Taylor v. St. Louis National Life Ins. Co., 26 Mo. 283, l. c. 290, 181 S. W. 8, it stands out in bold-faced type that Kelly and the other individual defendants were not and could not have been president, secretary and treasurer of the defendant corporation at the time of the alleged employment of plaintiff. Further along in the opinion in that case, Judge GRAVES says (l. c. 293 *et seq.*), and referring to an alleged contract between the plaintiff there and what is called the "organization committee:" "All the proceedings seem to appear in the name of the organization committee, until the time came when, as they thought, all the proposed charter capital had been subscribed, whereupon they all met, adopted the proposed

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charter, selected the board of directors, and such board in turn selected the officers, which we have named. This, however, was all done subsequent to the alleged employment of plaintiff. At the time of plaintiff's employment, neither S. nor his committee had any stock to sell."

As a general rule, a corporation is not liable for services rendered by a promoter. There are cases, however, which hold that a promoter is entitled to recover for services rendered by him in promoting the corporation. "But in such cases it should be made to appear: (a) that he himself expected to be compensated for his services; (b) that such services were rendered at the request of, or under contract with the associate promoters, or a majority of those; and (c) that the acts done were necessary to the organization and its objects, and that the corporation received and enjoyed the benefits." [1 Thompson on Corporations (2 Ed.), secs. 88 and 89.]

It is true that our Supreme Court has said in Taussig v. St. Louis & Kirkwood Ry. Co., 166 Mo. l. c. 38, referring to services in the preparation of articles of incorporation, and in connection with procuring the incorporation, "That for such services the plaintiff may recover upon an implied promise to pay their reasonable value is also sustained by the weight of authority, unless the understanding was that they were to be gratuitous." Judge BRACE cited a number of authorities, including that of Bell's Gap R. R. Co. v. Christy, 79 Pa. St. 54, of which he says that the rule is there well stated, and quotation is made of the first of the syllabi of that case. When we turn to the Pennsylvania decision itself (l. c. 59), we find the law more fully stated than in the syllabus, thus:

"We do not desire to controvert the principle, established in England, and to some extent recognized in this country, that when the projectors of a company enter into contracts in behalf of a body not existing at the time, but to be called into existence afterwards, then if the body for whom the projectors assumed to act does

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come into existence, it cannot take the benefit of the contract without performing that part of it which the projectors undertook that it should perform. Conceding to this principle its full force and effect, we are unable to see its application to the facts of this case. It may very well be that where a number of persons not incorporated are yet informally associated together in the pursuit of a common object, and with the intent to procure a charter in the furtherance of their design, they may authorize certain acts to be done by one or more of their number, with an understanding that compensation shall be made therefor by the company when fully formed. And if such arts are necessary to the organization and its objects, and are subsequently accepted by the company, and the benefits thereof enjoyed by them, they must take such benefits *cum onere*, and make compensation therefor. But the projectors or promoters of the enterprise within the meaning of the rule referred to, evidently must be a majority at least of such persons, and not one, two, or three, or a small minority thereof. Such minority can have no more authority to bind the association or corporation in its incipient or inchoate condition than they would have to bind it if fully organized. In this case the two or three persons who it is alleged promised the plaintiff to see him paid, bound no one but themselves."

See further on this, Queen City Furniture & Carpet Co. v. Crawford, 127 Mo. 356, 30 S. W. 163; State ex rel. Hadley v. People's United States Bank, 197 Mo. 574, l. c. 591, 94 S. W. 953; Taylor v. St. Louis National Life Ins. Co., supra, Van Noy v. Central Union Fire Ins. Co., 168 Mo. App. 287, l. c. 295, 153 S. W. 1090; Royal Casualty Co. v. Fuller, not yet officially reported, but see 186 S. W. 1099.

It does not appear in the case at bar how many were associated with these three individual defendants in acceding to the proposition which plaintiff claims. It does appear, however, affirmatively, that there were more than the three individual defendants associated together in this preliminary work, and it most certainly

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does not appear that the three individual defendants here, whose agreement is here relied on, constituted a majority of such parties. No one of these individual defendants was in the position of the officer who had made the arrangement with Mr. Taussig as in the St. Louis & Kirkwood Railway Company cases, supra, and the services there rendered were of a totally different kind and scope than these at bar. So that the decision of our Supreme Court in the Taussig cases is to be taken in connection with the facts there present, which were entirely absent in the case at bar. That may be said of the case of Little Rock & Ft. Smith R. R. Co. v. Perry, supra. An examination of that case discloses a state of facts entirely different from the case at bar. Moreover, while the Supreme Court of Arkansas there states the rule as developed in the English courts of chancery as an equity doctrine and applicable in actions at law *ex aequo et bono* as preventing fraud and imposition, after an examination of the authorities at page 191, sums up the rule to be derived from them, "that, in order to recover in an action at law, the plaintiff must show either an express promise of the new company, or that the contract was made with persons then engaged in its formation, and taking preliminary steps thereto, and that the contract was made on behalf of the new company, in the expectation on the part of plaintiff, and with the assurance on the part of the projectors, that it would become a corporate debt, and that the company afterwards entered upon and enjoyed the benefit of the contract, and by no other title than that derived through it. From these circumstances an affirmance would be implied." The Supreme Court of Arkansas held that there must be some showing of ratification or, more correctly speaking, adoption, by the corporation when organized, beyond the mere fact that by being organized at the time it was it became entitled to the benefit of the land grant which plaintiff's efforts had saved to the company.

These cases which we have cited from the Pennsylvania and Arkansas Supreme Courts are leading cases

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on the subject. Another case in which the authorities are very fully collected is that of Cushion Heel Shoe Co. v. Hartt, 181 Ind. 167. It is held in that case, quoting from the syllabi, "A promoter, in bringing about the organization of a corporation, and securing stock subscriptions, occupies a fiduciary relationship towards the corporation, the stockholders, and those who are expected to buy stock, and where he expects to be paid for his services that fact should be disclosed to them in advance." It is further there said: "In the absence of statutory or charter provisions, a corporation will be held liable for services rendered by its promoters before incorporation only when, by express action taken after it has become a legal entity, it recognizes or affirms such claim." That is what we practically held in Royal Casualty Co. v. Fuller, supra.

Another point to be here borne in mind is, this is an action at law on *quantum meruit* as set out in this second count. Not a particle of testimony was given or offered to show the value of any services, so upon what basis the jury awarded plaintiff $2000 is impossible of ascertainment. The learned counsel for respondent attempts to meet this proposition by saying that even if there was no evidence of the value, which, however, that counsel denies, the case could nevertheless have gone to the jury. In support of this, counsel cites some cases which he thinks sustain him. We do not think they cover services of the kind here involved.

In Bradner v. Rockdale Powder Co., 115 Mo. App. 102, 91 S. W. 997, where it appeared that no proof was adduced to show the reasonable value of the services of plaintiff rendered in selecting a suitable site for the erection of a powder magazine, plaintiff insisting that the value of such services came within the reasonable common knowledge of ordinary men and that the jury might settle on that value without evidence to aid them, our court said: "The reasonable value of such services as plaintiff rendered is not a matter of such common knowledge that testimony on the subject may be dispensed with. . . . The very essence of a case *quan-*

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tum meruit is the reasonable value of the work or property in dispute; and when the case is such that the inquiry as to the value is susceptible of proof by testimony, proof must be made." We followed this in Woodward v. Donnell, 146 Mo. App. 119, 123 S. W. 1004, where other authorities bearing on the same proposition are collated.

Without going further into the authorities and referring to those which are so fully reviewed in the cases which we have cited, it is sufficient to say that it does not appear in the first place that the three individual defendants, who are alleged to have employed plaintiff, were a majority even of the promoters; in the next place, the testimony is entirely too indefinite to constitute substantial testimony to the effect that even these parties may be said to have availed themselves of the services of the plaintiff with any sort of understanding that he was to receive, in addition to his commissions on the sale of stock, one-half of one per cent. on the gross sales of the corporation when formed, for a period of five years, or any other sum. That depended on the contract set up in the first count of the petition and the verdict of the jury against plaintiff and in favor of all the defendants negatives the existence of the contract there alleged. Furthermore, it does affirmatively appear that when the matter of the services of plaintiff was first called to the attention of the directors of the corporation after its organization, they not only denied any such understanding as to payment of one-half of one per cent. on the gross sales of the company for five years, or any other sum, but explicitly claimed that plaintiff had been paid in full for all the services which he had rendered in connection with the sale of stock.

It is to be borne in mind that there is no pretense that the plaintiff in this case rendered any services whatever in connection with the organization of the corporation, beyond soliciting and receiving subscriptions to its proposed capital stock. None of the facts present in the Taussig cases, or in the Arkansas, Indiana and Pennsylvania cases are here present. In each one of

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these cases, visible, tangible property, which had been secured or procured by the promoter, had been turned over to the corporation after its organization and was retained by it, and in the Taussig cases the defendant had availed itself of the professional services of the plaintiff in effecting its organization, he even undertaking in its behalf, defense of suits that were brought affecting the property in which the corporation was to become interested.

In the Royal Casualty Company case, supra, as before noted there was a distinct adoption of the contracts of the promoters, made by the corporation after its organization, with a full knowledge of all the facts connected with it. If we are to allow the plaintiff to prevail in this case, we must hold that by the mere act of accepting incorporation—by the mere act of becoming a corporate body, the corporation, as an entity, had accepted the benefit of the services of the plaintiff in obtaining subscriptions to its capital stock. Of course, it could not lawfully engage in business, under our law, until at least one-half of the stock is subscribed and paid for in cash or its equivalent. [Laws 1911, p. 148.] Beyond this soliciting and placing of subscriptions to stock, the plaintiff here does not pretend to have rendered any services whatever in connection with the organization of the corporation. Yet to enable plaintiff to recover, we must hold that three of the promoters had power to pledge the whole income of the corporation to be formed to a payment to this plaintiff for his services in procuring subscriptions to its stock, and that by the mere act of incorporation, accepting the subscriptions and going on with its business, the corporation bound itself to pay for obtaining the subscriptions. Until the organization of the corporation, the only parties concerned in securing subscriptions to the proposed corporation were the promoters, of whom plaintiff himself was one, and all the work plaintiff performed and all the services he rendered were for the promoters and not for the corporation. The corporation, as such, prior to its organization, was not concerned in that. We are

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unwilling to hold that by the mere fact of accepting incorporation and proceeding as a corporate body, the corporation, as such, could be made liable on any such contract by a few of its promoters, and we venture to go further and say that we do not believe that it was within the power of any promoter, in any such manner as here claimed, to encumber the whole property of the corporation—all of its business. We are aware that there are some cases which seem to hold that mere services in procuring the sale or subscriptions to the capital stock of a proposed corporation are such services, when rendered at the instance of the promoters, as imposes an obligation on the corporation, when formed, to pay the reasonable value of those services. We in effect held to the contrary in Royal Casualty Co. v. Fuller, supra. We find no authority in our State authorizing any such conclusion, and in the absence of controllig decisions of our own courts, we are unwilling to sanction such a rule. Here we have nothing to carry knowledge to the stockholders as a body, or even a majority of them, nor is there any proof even tending to show ratification by the stockholders of any agreement by which the assets of the corporation, which they were invited to become a part of, were subject to any burden for preliminary work of organization, a burden which might have "killed" the organization at its start.

On the grounds we have stated, plaintiff is debarred from any recovery, and the demurrer to the evidence should have been sustained.

The judgment of the circuit court must be reversed. It is accordingly so ordered. *Allen* and *Thompson, JJ.*, concur.

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ANDREW IRWIN, Appellant, v. UNITED RAILWAYS COMPANY OF ST. LOUIS, Respondent.

St. Louis Court of Appeals, February 6, 1917.

1. **TRIAL PRACTICE: Demurrer to Evidence: Rules of Decision.** In passing upon a demurrer to the evidence, the court must consider the evidence introduced by plaintiff as true, and draw therefrom every reasonable inference in his favor, warranted by law.

2. **STREET RAILWAYS: Collision with Wagon: Contributory Negligence.** In an action by the driver of a wagon for injuries sustained in a collision between the wagon and a street car, plaintiff testified that, when he started to drive across the track, the wagon was traveling at the rate of three or four miles per hour; that, at that time, he looked and saw the car, two hundred and fifty feet distant; that it was at such an acute angle from him as to make it difficult for him to accurately estimate its speed, but he thought he had ample time to cross the track in safety; and that, after the wagon had moved a distance of twenty-five or thirty feet from the time he first observed the car, the car collided with the rim of one of the rear wheels of the wagon. *Held*, that, although plaintiff did not look at the approaching car, after he first saw it, he was not guilty of contributory negligence as a matter of law, since, not being able to accurately determine the speed of the car, his error in thinking he had ample time to cross the track in safety was merely an error of judgment.

3. ———: ———: **Common-Law Speed.** In an action by the driver of a wagon for injuries sustained in a collision between the wagon and a street car, evidence that, when plaintiff started to drive across the track, the car was two hundred fifty feet away, that the wagon was traveling at the rate of three or four miles per hour, and traveled twenty-five or thirty feet before the car struck the rim of one of the rear wheels, *held* to warrant a finding that the car was running at the rate of thirty or more miles per hour, and that, under all the circumstances, irrespective of the speed ordinance, such speed was excessive, and that a causal connection between such excessive speed and the collision existed.

Appeal from St. Louis City Circuit Court.—*Hon. Wilson A. Taylor*, Judge.

REVERSED AND REMANDED (*with directions.*)

Rodgers & Koerner for appellants.

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(1) A demurrer to the evidence admits as true every inference that may be reasonably deduced therefrom inference that may be reasonably deduced therefrom. Strauchon v. Street Railway Co., 232 Mo. 587, 595. (2) The case should have been submitted to the jury. The evidence tended to prove that defendant was negligent in at least two respects; one, in operating its car at excessive speed; and, two, in failing to keep a vigilant watch and to stop its car upon the first appearance of danger to plaintiff. Strauchon v. Street Railway Co., 232 Mo. 587; Meenach v. Crawford, 187 S. W. 879, 884; Ingino v. Street Railway Co., 179 S. W. 771; Shafstette v. Railroad, 175 Mo. 142, 150; Mather v. Railroad, 166 Mo. App. 142, 148. The evidence does not show contributory negligence on plaintiff's part as a matter of law. Authorities *supra.* Criss v. United Railways Co., 183 Mo. App. 392, 402; Lueders v. Railroad, 253 Mo. 97.

Boyle & Priest, W. Blodgett Priest and *L. Marquard Forster* for respondent.

(1) The evidence introduced by the plaintiff does not show negligence on the part of the defendant company. Lorenzen v. Railroad Co., 249 Mo. 183; McCreery v. Railroad, 221 Mo. 18; Osborne v. Railroad, 166 S. W. 118. (2) There was no proof of excessive speed on the part of the defendant, still had there been such proof, the negligence of the plaintiff in failing to stop before going upon the track, when by the exercise of ordinary care, he could have seen the impending danger, bars a recovery. McCreery v. Railroad, 221 Mo. 18; Stoetler v. Railroad, 204 Mo. 619; Huggart v. Railroad, 134 Mo. 673; Roenfeldt v. Railroad, 180 Mo. 554; Laun v. Railroad, 180 Mo. 554. The plaintiff cannot recover on the theory that he thought the car was running in compliance with the speed-governing ordinance, because there was no evidence to show that he knew of such

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ordinance or that he relied on such ordinance. Mockowik v. Railroad, 196 Mo. 550, 571; Paul v. Railroad, 152 Mo. App. 577, 587; Voelker Products Co. v. Railroad, 185 Mo. 310. The court rightly took the case from the jury on the humanitarian doctrine—(a) As there was no evidence to show that the motorman could have stopped the car in time to have averted the collision, after he saw, or by the exercise of due care, could have seen the wagon in a position of danger. Borina v. Railroad, 194 Mo. 541; Reno v. Railroad, 180 Mo. 469; Giardina v. Railroad, 185 Mo. 335; Markowitz v. Railroad, 816 Mo. 350; Roenfeldt v. Railroad, 180 Mo. 565. (b) Because the plaintiff being fully aware of the approach of the car, knowingly allowed himself to be placed in a position of danger. Kinlen v. Railroad, 216 Mo. 145, 164.

BECKER, J.—In our statement of facts we are adopting the statement of appellant practically *in toto*.

This is a suit for damages for personal injuries alleged to have been sustained by plaintiff being thrown to the ground and injured as a result of the rim of the right hind wheel of the wagon, in which plaintiff was riding, being struck by a street car owned and operated by the defendant company. The alleged injuries were sustained on May 24, 1913, about midnight.

The plaintiff's petition makes the following assignments of negligence:

"That defendant's servants in charge of said car failed to keep a vigilant lookout for persons and vehicles crossing the car tracks;

"That defendant's said servants operated said car at a rate of speed exceeding the limit of fifteen miles per hour prescribed by the ordinance of the city of St. Louis;

"That defendant's said servants failed to keep and have said car under such control that they could stop the same upon the appearance of danger to persons lawfully on the car tracks;

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"That defendant's said servants saw, or by the exercise of ordinary care could have seen, plaintiff on his wagon crossing said car tracks in a place of danger, but negligently failed to stop said car before colliding with said wagon, although by the exercise of ordinary care on their part said car could have been stopped after plaintiff's perilous position was, or by the exercise of ordinary care on their part could have been, seen by them."

The answer was a general denial and a plea of contributory negligence.

Plaintiff's evidence tended to prove that at the time in question he was driving a one-horse wagon westwardly along the north side of St. Louis avenue, a public street of the city of St. Louis, upon which a double street car track is laid. When he arrived opposite the entrance to the alley which extends southwardly from St. Louis avenue one hundred and fifty feet east of Union avenue, and which leads to the barn where he kept his horse, plaintiff turned his horse southwardly with the intention of crossing St. Louis avenue and entering this alley. As his horse started to turn to the south, plaintiff looked and saw an eastbound street car on the south track on St. Louis avenue. This car was then west of Union avenue and moving eastward. Plaintiff thought he had plenty of time to cross the tracks in safety, but about the time his horse entered the said alley the said street car struck the rim of the hind wheel of his wagon. From the time plaintiff turned his horse to the south and started across the street railway tracks until the time when the car struck the wagon, plaintiff's horse had been moving in a walk at the rate of three or four miles an hour, and had moved a distance of twenty-five or thirty feet. Union avenue is one hundred feet wide where it crosses St. Louis avenue, and, as has been above stated, this alley is one hundred and fifty feet east of Union avenue. The headlight of the said street car was lighted and burning, and there was a street lamp on the west side of the entrance to this alley.

On cross-examination, plaintiff testified that after he started across the tracks he did not again see the car

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until it struck the wagon; that he was watching where he was going and thought he had plenty of time to cross the tracks without being hit.

Plaintiff's testimony was corroborated by that of his son, Cole Irwin, who was with him at the time.

William P. Smith, who qualified as an expert, testified that at the place in question one of the defendant's east-bound cars crossing Union avenue and running eastwardly on St. Louis avenue, if running at the rate of fifteen miles per hour, could be stopped within seventy feet.

Plaintiff offered in evidence sections 2380 and 2381 of the Revised Code of St. Louis of 1912, and it was admitted that St. Louis avenue, at the place mentioned in the evidence, is within the "outer district" mentioned in section 2381 of ordinance. It was also admitted that the street car mentioned in the evidence was owned and operated by defendant.

At the close of plaintiff's case the court, at defendant's request, peremptorily instructed the jury to find for defendant. Plaintiff then took an involuntary nonsuit and in due course filed his motion to have the nonsuit set aside, which motion the trial court overruled, and appellant appealed.

I. The sole question in this case is whether there was any error in the action of the court in giving the peremptory instruction for the jury to find for the defendant. As was said in Meenach v. Crawford (Mo.) 187 S. W. 79:

"In passing upon a demurrer to the plaintiff's petition or a peremptory instruction for the jury to find for the defendant, the court must consider the evidence introduced by plaintiff as true, and draw therefrom every reasonable inference which the law warrants in her favor. [William v. Railroad, 257 Mo. 87 l. c. 112, 165 S. W. 788, and cases cited.]"

II. We are not persuaded that the plaintiff in this case can, as a matter of law, be held guilty of contributory negligence. Plaintiff's testimony shows that when he started to drive across the tracks the car was two

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hundred and fifty feet away; that his horse was then walking at a rate of three or four miles per hour, and that he thought he had ample time to cross the tracks in safety. He did not testify as to what rate of speed he thought the car was traveling. However, when he saw the car, it was at an acute angle, making it difficult for him to accurately estimate its speed. His error, if any, was an error of judgment, which, in view of the facts and reasonable inferences which must be drawn in this case, we cannot hold, as a matter of law, was negligence on his part. [Heintz v. St. Louis Transit Co., 115 Mo. App. 667, 92 S. W. 353; Murray v. St. Louis Transit Co., 108 Mo. App. 501, 83 S. W. 995.] In accordance with the adjudicated cases the question of whether or not the plaintiff was guilty of contributory negligence should have been submitted to the jury.

III. It will be noted that amongst the assignments of negligence pleaded in plaintiff's petition was that of common law negligence, that defendant's servants failed to keep its car under such control that the car could have been stopped upon the appearance of danger to persons lawfully on the car tracks. Let us examine whether the question of negligence in this respect, on the part of the defendant, was properly withheld from the jury.

It must be remembered that the testimony shows that at the time plaintiff started to drive across the double tracks, the car which caused the alleged injuries was two hundred and fifty feet away, and that in the time plaintiff drove twenty-five or thirty feet, at the rate of three to four miles per hour, the car traveled a distance of two hundred and fifty feet, striking the rim of the right hind wheel of plaintiff's wagon. The demurrer conceding the truth of these facts, it is readily calculated that the defendant's car was traveling at a rate of twenty-four to thirty miles per hour.

We are therefore of the opinion that the question, whether or not the rate of speed at which the car was going was an excessive rate, and a rate for which defendant should be held for negligence, was a question

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for the jury, particularly so in this case inasamuch as the car hit merely the rim of the hind wheel, so that had the plaintiff had even a fraction of a second more time, in other words had the car been traveling at a very little less rate of speed, the collision would have been averted.

If, for example, this question had been submitted to the jury would it not have been possible for them to have found from the evidence that the car was going at a speed of thirty miles per hour, and that under all the circumstances surrounding the case, irrespective of the speed ordinance, such speed was excessive and the defendant therefore guilty of negligence. And the circumstances had to show that there was a causal connection between the excessive speed and the collision caused by the car running into the wagon driven by plaintiff; for inasmuch as the car, if the jury found it traveled thirty miles per hour, would at that speed have covered the distance of two hundred and fifty feet intervening between the car and the plaintiff's wagon in a period of approximately 5.9 seconds, and if the jury were to hold that under the circumstances the car should not have been running, say, for the sake of argument, at a speed not to exceed twenty-five miles per hour, then it would have taken approximately 8.5 seconds for the car, at that speed, to have covered the same distance. In other words, it would have taken the car 2.6 seconds longer to cover the two hundred and fifty feet at twenty-five miles per hour than at the rate of thirty miles per hour, which would have allowed the plaintiff an additional 2.6 seconds, in which time he would have gone an additional distance of over eleven feet, at the rate of three miles per hour, and thus have enabled him to have crossed the tracks in safety.

We are therefore of the opinion that in the case at bar, this question should have been submitted to the jury.

It is not necessary to discuss the other questions in the case.

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For the reasons set out above the judgment should be reversed and the cause remanded with direction to th trial court to set aside the nonsuit and grant the plaintiff a new trial. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

JOSEPH REZABEK, JR., Administrator, Respondent, v. MARGARET REZABEK, Appellant.

St. Louis Court of Appeals, February 6, 1917

1. **HUSBAND AND WIFE: Leasehold Property: Action by Husband against Wife for Accounting: Sufficiency of Evidence.** In an action by a husband against his wife, to have her declared a trustee for him as to a one-half interest in a leasehold, and for a judgment against her for one-half of the rents and profits received by her from such leasehold, *held* that findings of fact, upon which a judgment was rendered in favor of the husband for one-half of such rents and profits, were supported by the evidence.

2. ———: **Estate by Entirety: Personal Property.** An estate by the entirety may exist in personal property.

3. ———: **Leasehold: Estate by Entirety.** A lease of real property to a husband and wife during coverture creates an estate by the entirety, so that, upon the death of the husband, the wife has no right of homestead in the leasehold, but takes the same by right of survivorship.

4. ———: **Estate by Entirety: Leasehold: Renewal of Lease: Constructive Trusts.** A lease was made to a husband and wife for a certain period of time, with a provision for a renewal for another like period, and, pursuant to such provision, the lease was renewed. Prior to the expiration of the renewal, the wife applied to the lessor for a new lease in her name alone, falsely stating that her husband was crazed and was unwilling to renew. At this time the husband had a substantial interest in the leasehold, including the right to remove buildings from the demised premises, and, prior to the expiration of the lease, he attempted to renew the same. *Held*, that, in equity, the husband was entitled to the same interest in the new lease as he had in the previous one, namely, an estate by the entirety with his wife.

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5. ———: ———: ———: ———: ———: **Accounting for Rents.** Where a husband and wife held a leasehold estate as tenants by the entirety, and, while they were separated from each other, the wife collected the rents and income therefrom, the husband's personal representative was entitled to recover, in an action for an accounting against the wife, one-half of such rents and income so received by the wife, up to the time of the husband's death.

6. ———: ———: ———: **Credit for Expenditures.** In an action by an administrator, against the wife of his decedent, for one-half of the rents and profits of an estate by the entirety in a leasehold, collected by her up to the time of the husband's death, *held* that each of the parties should be charged with one-half of an indebtedness they had incurred for the improvement of the leasehold property.

7. ———: ———: ———: **Correctness of Accounting.** In an action by an administrator, against the wife of his decedent, for one-half of the rents and profits of an estate by the entirety in a leasehold, collected by her up to the time of the husband's death, *held* that the account between the parties was correctly stated by the trial court.

8. **APPELLATE PRACTICE: Harmless Error: Correct Result.** Although the trial court is in error in its conclusions of law, the judgment will nevertheless be affirmed, if it is in favor of the right party and for the correct amount.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

AFFIRMED.

Campbell Allison for appellant.

First. Tenancy by the entirety applies to personal property in the State of Missouri. Johnson v. Johnson, 173 Mo. 91, 113; Ryan v. Ford, 151 Mo. App. 689; Craig v. Bradley, 153 Mo. App. 586. Second. Conveyance of leasehold to husband and wife creates a tenancy in the entirety. Sec. 2878 (Common), Revised Statutes 1909; Sec. 2788 (Entirety), Revised Statutes 1909; Gibson v. Zimmerman, 12 Mo. 385; Shields v. Stillman, 48 Mo. 82; Hull v. Stephen, 65 Mo. 670; Russell v. Russell, 122 Mo. 237; Bain v. Bullock, 129 Mo. 117; Frost v. Frost, 200 Mo. 478. Third. Tenancy by the entirety, each hold *per tout* and not *per my*; each owns all and

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neither owns a part; each is entitled to all the rents and profits and neither to a part. Washburn on Real Property (3 Ed.), pp. 553-577; Willard on Real Property, p. 17, sec. 21, p. 178; Russell v. Russell, 122 Mo. 237. Fourth. If an accounting should be decreed as between husband and wife to property held as tenants in the entirety, then equity will decree all the debts which are an equitable lien upon the property, and for which both parties are severally liable, should be paid before one party has judgment against the other for one-half of the rents. Fifth. The allegata and probata must agree. A decree must be responsive to the pleadings. Spindler v. Hyde, 247 Mo. 48; Buck v. Doran, 109 Mo. 51; Cole v. Armour, 154 Mo. 333; McCormick v. Railroad, 154 Mo. 191.

W. B. & Ford W. Thompson for respondent.

STATEMENT.—The original parties to this suit were Joseph Rezabek, plaintiff, and Margaret Rezabek, defendant, his wife, but before the final hearing of the case the plaintiff died and the cause was revived in the name of Joseph Rezabek, Jr., administrator of the estate of Joseph Rezabek, deceased.

Plaintiff seeks herein to have the court decree that the defendant, wife of the plaintiff, obtained a certain leasehold on property in the city of St. Louis by fraud, and decree that the defendant, wife, holds said leasehold as trustee for the benefit of plaintiff, and that she account to plaintiff for the rents and profits collected by her under said leasehold, and that the defendant be decreed to deliver up said lease, and that the same be cancelled, and that the maker of the said lease be required to execute a new lease on the premises in question to plaintiff for the term and upon the conditions and stipulations provided in such surrendered lease, and for such other and further relief in the premises as to the court may seem meet and proper.

The answer of the defendant denies that the said lease was obtained by fraud but alleges the fact to be

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that the lease was taken in the name of the wife, defendant herein, with the consent of the plaintiff.

The cause was referred to a referee to take the testimony and try all the issues. The referee found, and the finding was sustained by the trial judge, that the plaintiff was entitled to an undivided one-half interest in the said leasehold and the wife was decreed to be trustee for the plaintiff to that extent, and that an accounting of the rents and profits collected by the wife, under this leasehold during the term in question, showed a net balance in favor of the husband, as a holder of a one-half interest in the said leasehold, in the sum of $221, for which said sum, together with costs, a judgmeut was rendered in favor of the plaintiff and against the defendant.

The defendant filed a motion for rehearing, which was overruled and defendant takes appeal to this court.

Plaintiff and defendant were married in 1873. They lived together peacefully until the year 1901, when, owing to plaintiff's addiction to drink, and other causes not very clearly defined in the evidence, their relationship began to be one of constant disagreement. However, it shows that prior to 1901 they lived pretty much the same as any family in their station of life, the wife receiving the earnings of the husband and children, acting as banker for the family.

In 1876 plaintiff purchased a lease upon which there was an unexpired term of four years and a right of renewal for a further term of ten years. The right of renewal was exercised and thus the leasehold is carried up to May 1, 1891, in the name of the husband, plaintiff below. From time to time out of the earnings of the several members of the family, together with such rents as were collected on the improvements, more improvements were built upon the land held under the leasehold until the value thereof had reached approximately $5700. In 1891, when the term expired, the plaintiff was in Chicago and because of that fact caused defendant to go to the owner of the said land to renew the lease for a further period of ten years. The owner,

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plaintiff not being present, caused the renewed lease to be made out in the name of both plaintiff and the defendant and had the wife sign the semi-annual rent notes to cover the rent reserved under the said lease. The husband later on returned to the city and thereupon signed the said semi-annual rent notes which had already been signed by the wife.

This renewed lease covered the period of May 1, 1891 to May 1, 1901, during which period the St. Louis cyclone, in 1896, damaged the improvements on the property and plaintiff and defendant borrowed sums aggregating $1000, which money was used in repairing and rebuilding the improvements. No part of this sum, so borrowed, was paid off up to the date of plaintiff's death, January 28, 1909. During the period 1891 to 1901 the wife collected the rent almost constantly from the tenants and the husband paid little attention thereto. This renewed lease did not provide for any further renewal, but did, however, give plaintiff and defendant the right, at the expiration thereof, to remove the buildings thereon within a stated time thereafter.

From this point on, namely, from the expiration of the said lease in the name of both plaintiff and defendant, which expired in 1901, the plaintiff seeks relief.

It appears that in 1901, a month or so before the expiration of the leasehold held in the name of both husband and wife, the husband had been drinking heavily and assaulted his wife. He was arrested and held in the observation ward in St. Louis for three days, and after his release the parties lived separate and apart.

Thereupon the wife took a new lease on the property in her own name for a period of ten years, commencing immediately at the expiration of the leasehold held in her name and that of her husband.

It is this leasehold, taken in the name of the wife alone, which plaintiff alleges was obtained by fraud and seeks to have the wife held to be holding as trustee for him, and for an accounting of the rents and profits that have been collected by the wife under said leasehold.

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BECKER, J., (after stating the facts).—The findings of fact made by the referee, to whom the cause was referred to take the testimony and try all the issues, and which findings were confirmed by the trial court, are sufficiently supported by the evidence, and we therefore allow them to stand. However, we cannot agree with the conclusion of law drawn therefrom by the referee and the trial judge.

The referee's report states:

"I find that in 1891, when the lease was taken in the joint names of plaintiff and defendant, there was no fraud or imposition practiced by the defendant, Margaret Rezabek, and that thereafter when the plaintiff's intestate signed the lease he must have seen his wife's signature attached thereto, and that he thereby ratified her action in taking a lease in the joint name of herself and husband. The lease thus executed contained no provision for renewal, but did provide that said Joseph Rezabek and Margaret Rezabek, their heirs and assigns, are entitled to remove all buildings at the final expiration of this lease; provided, such removal be made within thirty days thereafter. Prior to the expiration of this lease, the defendant, Margaret Rezabek applied for a new lease in her own name, stating that her husband was crazed with drink, and was unwilling to renew the same. By means of such representation, she prevailed upon the Mercantile Trust Company, acting as the agent for George W. Allen, to execute to her a lease dated March 22, 1901, for a term commencing May 1, 1901, and ending April 30, 1911. This lease was made more than a month before the expiration of the lease in the joint names of defendant, Margaret Rezabek, and plaintiff's intestate. Plaintiff's intestate had a substantial interest in the same, including the right to remove the buildings, then located on the premises, which did not expire until May 31, 1901. Prior to the expiration of the lease in the names of plaintiff's intestate and the defendant, Margaret Rezabek, plaintiff's intestate called at the Mercantile Trust Company and sought a renewal

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of the lease, and he was then informed that a lease had already been made to his wife.

"I am of the opinion that the relation of joint owners of a leasehold estate is similar to tenants in common of a freehold, and that, where one of the parties acquires rights as against the other and adverse to him, the same inures to the benefit of his cotenant.

"I, therefore, recommend that defendant, Margaret Rezabek, account to plaintiff for one-half of the net rental of the property from the first of May, 1901. . .

"I further recommend that a decree be entered herein, declaring that Margaret Rezabek holds a one-half interest in the leasehold estate as trustee and for the benefit of the plaintiff. And that plaintiff be required to assume one-half of the debt of $1000, which was incurred in repairing the improvements caused by the cyclone in 1896."

The court handed down two written memoranda in the case, one after the referee's report of his finding of facts and an accounting up to April 1, 1906, and the other at the conclusion of the accounting made by the referee for the period from April 1, 1906 to the date of the death of the plaintiff. From these memoranda of the court we quote the portions necessary for an understanding of the questions of law involved in the case:

"Counsel for defendant in this case contended with much earnestness that the lease to Joseph Rezabek and his wife constitutes them tenants by the entirety, and that since Joseph has died the wife holds the entire estate by right of survivorship. If this be granted, it does not by any means follow that the wife, having appropriated the entire income of the estate during the joint lives of herself and husband, may retain the same and not give account to her husband for any part of it. At common law the husband would unquestionably have been entitled to the entire income of this leasehold, and the greatest effect that can be claimed for our Married Woman's Act is, that it would entitle the wife during the joint lives of herself and husband to one-half of the

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income of the joint estate, so that, considering the contention made by defendant, and giving the Married Woman's Act the construction most favorable to her, yet the husband was entitled to one-half the income of this leasehold during his lifetime.

"The question of the character of this estate must be considered and determined in this case, as Joseph Rezabek has died, and it is claimed, on behalf of his administrator, that the estate was not, strictly speaking, an estate by the entirety or a joint estate at all, but rather an estate in common, and that, therefore, the doctrine of survivorship did not apply. Can there be an estate by the entirety in personal property? There are many cases which hold that there can be. On the other hand, our Supreme Court has said that there cannot be. [Polk v. Allen, 19 Mo. 467.]

"A leasehold estate, although for some purposes it is considered real estate, as, for instance, the purpose of levying an execution, is essentially personal property. *While I am not entirely clear, I am nevertheless of the opinion that the view of the referee is the correct one, and that the leasehold, which preceded the one taken in the name of the defendant alone, was an estate in common held by her and her husband, and not a joint estate. Therefore, she is trustee for him (or his personal representatives) as to an individual one-half interest in this leasehold.* (Italics ours.)

"The court is of the opinion that the right of homestead attaches not only to an estate which had been held in common but also that it attaches to a leasehold estate; therefore, Mrs. Rezabek was entitled to her possession of this property after her husband's death and, of course, need not account to his estate for the rental value of his half interest therein." (Italics ours.)

The court thus held that the lease covering the period from 1890 to 1901, held in the names of Joseph Rezabek and Margaret Rezabek (husband and wife), plaintiff and defendant herein, was *"an estate in common held by her and her husband, and not a joint estate,"* because *there*

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cannot be an estate by the entirety in personal property in the State of Missouri, and relies on the case of Polk v. Allen, 19 Mo. 467. Judge SCOTT in that case (decided in 1854) held:

"Husband and wife cannot be joint tenants or tenants in common of a chattel. A gift or bequest to the husband and wife would vest the entire property in the husband. On the death of the husband, the property would go to his representatives, and the wife would only be entitled to her dower in it. Whatever may be the construction of the act concerning married women, passed March 5th, 1849, the gift or bequest of the slave here, was long prior to that time."

While that case sustains the learned trial judge, that there can be no estate by the entirety in personal property, it, at the same time, makes his conclusion drawn from that viewpoint untenable, in that the opinion clearly states that *husband and wife cannot be joint tenants or tenants in common* of a chattel, but that a gift to husband and wife would vest the entire property in the husband. But we find, on examination of the decisions of our Supreme Court, that the Polk case, supra, is no longer the law in this State, and that our courts have since definitely held there can be an estate by the entirety in personal property.

Our Supreme Court, in an exhaustive opinion on this subject, written by Judge MARSHALL, held that "*the sum of the matter, therefore, is that estates by the entirety may be created in Missouri, in personal as well as real property, and between husband and wife as well as between strangers,* but that as to real property a grant or devise to two or more persons will be held to be a tenancy in common, unless by the terms of the grant or devise it is expressly declared to be a joint tenancy, except as to grants or devises to executors, trustees or husband and wife, which are excepted from the operation of the statute, and *that as to personal property the common law has not been changed by statute, except by the Married Woman's Acts which have*

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placed a husband and wife on the same footing in this regard, as any other persons. That is, the husband's common-law right to the wife's personal property and choses in action is taken away, except as to such as she had, and he had a vested right to reduce to possession, before the passage of the Married Woman's Acts." Citing Lette v. Bank, 115 Mo. 184, 21 S. W. 788; Ib., 141 Mo. 574, 42 S. W. 927. [Johnson v. Johnson, 173 Mo. l. c. 114-115, 73 S. W. 202.]

We are of the opinion, and so hold, that Joseph Rezabek and Margaret Rezabek, his wife, held said lease made in 1891 as tenants by the entirety. [Johnson v. Johnson, supra; Bains v. Bullock, 129 Mo. 117, 31 S. W. 342; Frost v. Frost, 200 Mo. 478, 98 S. W. 527.] And that, in view of the facts found by the referee's report, in equity plaintiff was entitled to the same interest in the new lease, dated March 22, 1901, covering the term commencing May 1, 1901 and ending April 30, 1911—namely, an estate by the entirety with his wife, the defendant. It naturally follows, and we so hold, that the wife had no right of homestead in the said leasehold after the husband's death, January 28, 1909, but that the leasehold became the property of the wife by right of survivorship.

Having decided that the leasehold in question was held by plaintiff and defendant, husband and wife, as tenants by the entirety, it becomes necessary to determine whether the husband, under such circumstances, is entitled to an accounting of the rents and profits from the wife, it being uncontradicted that, for the period of time in question in the instant case, the wife had assumed full control and management of the property covered by the lease and had collected all the rents therefrom.

The Russell case (122 Mo. l. c. 237, 26 S. W. 677) is cited by appellant here in support of the contention that the leasehold being "a tenancy by the entirety each held *per tout* and not *per my*, each owns all and neither owns a part; *each is entitled to all the rents and profits and neither to a part.*" (Last italics ours.)

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Appellant is amply sustained as to the several statements of law above quoted excepting as to that portion which, if supported by the said decision, would be decisive here in the case at bar, namely: *"each is entitled to all the rents and profits and neither to a part."* The Russell case, supra, however is silent on that point.

Neither counsel for appellant nor counsel for respondent have cited any case bearing directly on this phase of the case, and our examination has failed to find a case in point in our Missouri decisions. We find, however, that the question has been determined in other jurisdictions.

In Pennsylvania, in the case of McCurdy v. Canning, 64 Pa. St. 39, we find the court takes the view that the rents and profits cannot be disposed of nor changed except by the joint act of both husband and wife.

In New York and New Jersey however, the courts hold that husband and wife can be tenants by the entirety, yet that (Hiles v. Fisher, 144 N. Y., l. c. 315) "the parties become tenants in common or joint tenants of the use, each being entitled to one-half of the rents and profits during the joint lives, with power to each to dispose of or to change his or her moiety during the same period, which seems to be the view taken in Buttlar v. Rossenblath, 42 N. J. 651. We think the rule adopted in New Jersey best reconciles the difficulties surrounding the subject. The estate granted is not thereby changed. It leaves it untouched, with all its common law incidents. It deals with the rents and profits and the use and control of the estate during coverture only, and gives to each party equal right, so long as the question of survivorship is in abeyance, thereby conforming to the intentions of the new legislation to take away the husband's right *jure uxoris,* in his wife's property, and to enable the wife to have and enjoy 'whatever estate she gets by any conveyance made to her or to her and others jointly, and does not enlarge or diminish that estate. The rule in Pennsylvania not only deprives the husband of his common-law right to the enjoyment of the whole rents and profits, but of the

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enjoyment of any share thereof, except with the concurrence and permission of the wife."

Again, as was said in the case of Grossen v. City of Rochester, 148 N. Y., l. c. 237-238:

"When land is conveyed to husband and wife they each become seized of the entirety, and upon the death of either the whole survives to the other. We are aware that, by the common law, the husband before the death of his wife could possess and control the land and take all the profits thereof for his own benefit. [Bertles v. Nunan, 92 N. Y. 152.] This right, however, followed the conveyance and inured to the husband under the general principle of the common law, and was not acquired by reason of the creation of a tenancy by the entirety. So that, when the disability of the wife was removed under the Married Woman's Acts of 1848, and subsequent acts, she was thereafter permitted to have, hold and enjoy whatever estate came to her by devise or conveyance, and the husband's right to the sole occupancy and possession terminated. Thereafter she became entitled to hold, enjoy and possess with him as if she were a tenant in common. [Hiles v. Fisher, 144 N. Y. 306.]"

Quoting from the case of Collins v. Babbitt, 58 Atl. (N. J.) l. c. 485:

"It seems to be well settled that the effect and only effect of the Married Woman's Act of 1852 upon the peculiar estate in land held by a man and his wife under a conveyance to them jointly is to entitle the wife to an equal right with the husband to the usufruct of the land so held during their joint lives. At the common law the husband had the right during his lifetime to the exclusive usufruct of the lands held by him and his wife jointly, as well as of the lands held solely by the wife, but that right was taken away by the statute. The subject was considered by the Court of Appeals in the case of Buttlar v. Rosenblath, 42 N. J. Eq., 651, 9 Atl. 695, 59 Am. Rep. 52. At page 656, 42 N. J. Eq., page 698, 9 Atl., 59 Am. Rep. 52, Judge Van Syckei, speaking for that court, said: 'In virtue of the mar-

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ried relation, the husband took possession, and deprived the wife of the enjoyment of her estate or interest in the lands during their joint lives. In my opinion, the object and effect of the Married Woman's Act is to extinguish this right.' And at page 657, 42 N. J. Eq., page 698, 9 Atl. 59 Am. Rep. 52, he says: 'I think, therefore, that the just construction of this legislation, and the one in harmony with its spirit and general purpose, is that the wife is endowed with the capacity during their joint lives to hold in her possession, as a single female, one-half of the estate in common with her husband, and that the right of survivorship still exists, as at the common law.' "

We believe the view taken by the New York and New Jersey courts to be more in line with the intent and spirit of our Married Woman's Acts, and we, having already determined that the leasehold should be and is held by plaintiff and defendant in entirety, now hold that plaintiff was entitled to one-half of the rents and profits accruing from the leasehold, and therefore could maintain this action for an accounting thereof.

It is assigned as error that of the sum of $1000, which plaintiff and defendant had borrowed and used for repairs and improvements on the property held under the leasehold in question, the court found plaintiff below was chargeable with $500, and the defendant a like sum; that the referee, in the balancing of the accounts, only gave plaintiff credit for the sum of $500 as being the defendant's portion which he was liable for on the said indebtedness of $1000. Inasmuch as we hold that plaintiff and defendant (husband and wife) are tenants by the entirety in the leasehold, and that therefore, during coverture, each is entitled to one-half of the rents and profits arising therefrom, we find that the debiting of the net rents accruing during the time the wife collected same, in the sum of $1000, as is contended for by appellant, is not tenable, and that the plaintiff was only entitled to the crediting of the net rent account in the sum of $500 to cover defendant's one-half of the $1000 borrowed, which was, in point of fact, done.

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We find that the account between plaintiff and defendant is correctly stated up to the time of the death of plaintiff, after which time the leasehold became the sole property of the defendant by survivorship.

While the court below was in error in its conclusions of law, the court nevertheless entered a judgment in the correct amount and in favor of the right party. The judgment should therefore be affirmed. It is so ordered. *Reynolds, P. J.*, and *Allen, J.*, concur.

DAVID TREICHLINGER, Plaintiff in Error, v. FRENCH LICK SPRINGS HOTEL COMPANY, Defendant in Error.

St. Louis Court of Appeals, February 6, 1917.

1. **INNKEEPERS: Liability for Loss by Fire: Indiana Statute: Construction.** An Act of the State of Indiana (Acts 1907, ch. 88), entitled "An Act defining and limiting the liability of hotels in respect to the effects of guests and providing for the disposal of unclaimed goods left in hotels," fixes in section 1 (Burns' Ann. St. Ind. 1908, Sec. 7844) the liability of hotel proprietors for the loss of money, jewels and other valuables of a guest by theft. A subsequent section (Sec. 7845) declares that no hotel keeper shall be liable for loss of wearing apparel, goods, or merchandise for any sum exceeding the sum of $200, where it shall appear that such loss occurred without the fault or negligence of such hotel keeper, nor shall he be liable in any sum for the loss of any article belonging to such guests and not within the room assigned to him, unless it shall be specially entrusted to the care and custody of such hotel keeper. Under the common law of Indiana, innkeepers were not liable for losses resulting from accidental fires occurring without negligence. *Held*, that the latter section is intended to cover loss by theft, and not loss by fire.

2. ———: ———: **Loss Occurring in Another State: Laws Governing.** An action in this State against an innkeeper, for destruction of a guest's baggage by fire while in a hotel in another State, is governed by the laws of such other State.

3. ———: ———: **Common Law of Indiana.** Under the common law of Indiana, an innkeeper is not an insurer of a guest's goods, but

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is prima facie liable for loss or damage thereto not occasioned by the act of God, the public enemy, or by the fault of the guest; and proof of the destruction of a guest's property by fire makes out only a prima facie case of liability on the part of the innkeeper, which may be rebutted by proof that the loss was not occasioned by his fault or neglect or that of his servants.

4. ———: ———: **Common-law Rule: Weight of Authority.** According to the weight of authority in this country, an innkeeper is not liable for the destruction of his guest's property by accidental fire occurring without his negligence or the negligence of his servants.

5. ———: ———: ———: **Exculpation: Sufficiency of Evidence.** In an action against an innkeeper for destruction of a guest's luggage by fire while in defendant's hotel in the State of Indiana, where defendant adduced evidence tending to show that he was not guilty of negligence, he was not bound to further show the origin of the fire, in order to exculpate himself.

Error to St. Louis City Circuit Court.—*Hon. Thomas C. Hennings,* Judge.

AFFIRMED.

Stern & Haberman for plaintiff in error.

(1) At common law an innkeeper is absolutely liable for loss of the guest's property. Metzler v. Terminal Hotel Co., 135 Mo. App. 410; Fay v. Specific Co., 93 Cal. 253; Hulett v. Swift, 33 N. Y. 571; Crapo v. Rockwell, 94 N. Y. S. 1122. (2) In some states the innkeeper is only prima facie liable, but even under this rule the burden is on him to prove exoneration, and in this case he failed to carry the burden. Bowere v. De Wald, 2 Ind. App. 303; Baker v. Dessauer, 49 Ind. 28; Laird v. Eichhold, 10 Ind. 212; Sasseen v. Clark, 37 Ga. 242; Johnson v. Richardson, 17 Ill. 302; Palace Hotel v. Medart (Ohio), 100 N. E. 317. (3) The Indiana statute combines both rules, making the inkeeper absolutely liable up to $200 and excusing him beyond this upon his meeting the burden of proving lack of negligence. Section 7845, Ind. Stat. 1908.

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John C. Vaughan and *Perry McCart* for defendant in error.

(1) Under the common law of Indiana, the innkeeper is not liable for loss or destruction of his guests' goods if he exercised due care. Hill v. Owen, 5 Blackford 323; Thickstun v. Howard, 8 Blackford 534; Laird v. Eichold, 10 Ind. 212; Baker v. Dessauer, 49 Ind. 28; Bowell v. DeWald, 2 Ind. App. 303. (2) At common law innkeepers are not liable for the destruction of the guests' goods by accidental fire. Merritt v. Claghorn, 23 Vt. 177, 181; Vance v. Throckmorton, 5 Bush (Ky.), 41, 45, 46; Cutler v. Bonney, 30 Mich. 259; Johnson v. Chadbourn Co., 89 Minn. 310, 317; Weeks v. McNulty, 101 Tenn. 496, 499; 22 Cyc. 1081; Schouler on Bailments (3 Ed.), 297, 293. (3) Section 7845, Burns Ann. Stat. Ind. 1908, limits the common-law liability of innkeepers for thefts, and applies in no way to losses by fire. Burns Ann. Statutes of Ind. 1908, sections 7844, 7845, 7846 and 7847; 2 Cons. Laws of N. Y., pages 1851 and 1852, sections 200, 201, 202 and 203; Laws of Ind. 1907, page 110.

ALLEN, J.—This action is prosecuted by plaintiff in his own behalf and as assignee of the claims of thirteen other persons, to recover for the loss of baggage and other personal property of plaintiff and his assignors occasioned by the destruction of defendant's hotel, or a portion thereof, by fire, on March 28, 1910, while plaintiff and his assignors were defendant's guests therein. The trial before the court and a jury resulted in a verdict and judgment for defendant, and plaintiff has brought the case here by writ of error.

The petition is in fourteen counts based upon the fourteen respective claims, and pleads a statute of Indiana pertaining to the liability of innkeepers in that State, viz., Section 7845 of Burns' Annotated Statutes of Indiana (1908), as follows:

"No hotel keeper shall be liable for loss of wearing apparel, goods or merchandise for any sum exceeding the sum of $200, where it shall appear that such loss occurred without the fault or negligence of such hotel

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keeper, nor shall he be liable in any sum for the loss of any article belonging to such guest and not within the room assigned to him, unless the same shall be specially intrusted to the care and custody of such hotel keeper or his servants."

The answer admits that plaintiff and his assignors were guests in defendant's hotel and that a portion of the hotel was destroyed by fire, as alleged; but denies the other allegations of the petition; and avers that the loss, if any, was not due to the fault or negligence of defendant or his agents or servants, alleging that defendant maintained a watchman and proper fire apparatus and exercised "the strictest care and diligence to guard against and to extinguish fire." The answer further sets up that under the common law of Indiana an innkeeper is not liable for the loss of a guest's property occurring without fault or neglect of the innkeeper or his servants; and it is alleged that the section of the Indiana statute pleaded by plaintiff is a part of an act of the Legislature of Indiana enacted in 1907 entitled: "An Act defining and limiting the liability of hotels in respect to the effects of guests and providing for the disposal of unclaimed goods left in hotels." And the answer pleads section 1 of said act, being section 7844 of Burns' Annotated Statutes of Indiana (1908), which pertains to the liability of hotel proprietors for the loss of "money, jewels or other valuables" of a guest by theft; and alleges that the remainder of said act applies to the sale of unclaimed goods.

The parties through their counsel stipulated that while plaintiff and his assignors were defendant's guests, as alleged, their property mentioned in the petition, while situated in their respective rooms in defendant's hotel, was destroyed by fire which destroyed a portion of defendant's hotel; the parties stipulating as to the reasonable value of the property mentioned in the respective counts of the petition. Of these fourteen items contained in the stipulation only three are in excess of $200.

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At the trial plaintiff introduced this stipulation and rested. The record before us recites that "thereupon the defendant, to support the issues in its behalf, offered and introduced the evidence of various witnesses which tended to prove that on the 28th day of March, 1910, the hotel, described in the stipulation read in evidence by plaintiff, was completely destroyed by fire, but that on the date of the fire and prior thereto the defendant had exercised a very high degree of care in guarding the hotel premises against the danger of fire and had further exercised a high degree of care in providing facilities for extinguishing fire and had further exercised a high degree of care in using said appliances in endeavoring to extinguish said fire, and further offered evidence tending to show that the origin and cause of said fire was unknown."

Defendant further made due proof of the decisions of the Supreme Court of Indiana and of the Appellate Court of that State, respectively, in the cases of Laird v. Eichold, 10 Ind. 212, and Bowell v. De Wald, et al., 2 Ind. App. 303. And thereupon plaintiff offered in evidence the entire act of the Legislature of Indiana, of 1907, mentioned in defendant's answer, including what are sections 7844 and 7845 of Burns' Annotated Statutes, supra. Upon defendant's objection the act was excluded.

Plaintiff offered fourteen instructions, one covering each count of the petition. Eleven of these—which eleven were identical except as to amounts—covered the eleven counts in each of which the amount involved (according to the stipulation) did not exceed $200; and by each of these instructions it was sought to have the jury instructed to return a verdict for plaintiff on the count to which the instruction referred, for the amount stipulated to be the reasonable value of the property mentioned in that count. Plaintiff's remaining three instructions—also identical except as to amounts—covered the three counts of the petition each of which involved an amount (according to the stipulation) in excess of $200; and by each of these it was sought to have

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the jury instructed to return a verdict for plaintiff on the count to which the instruction referred, for $200, provided the jury found that the loss occurred without fault or negligence on defendant's part, but if the jury found that the loss was occasioned by defendant's fault or negligence, or that defendant's fault or negligence contributed thereto, then to return a verdict for plaintiff for the full amount stipulated to be the reasonable value of the property mentioned in such count.

All of these instructions offered by plaintiff were refused.

Two instructions were given at defendant's request. One merely instructed the jury that defendant's liability was to be determined by the law of Indiana. The other told the jury that section 7845 of Burns' Annotated Statutes of Indiana, supra, "was not intended to and did not add to the liability of hotel-keepers for loss of personal property by accidental fire in Indiana;" and instructed the jury to disregard the provisions thereof.

Under the evidence and these instructions the jury resolved the issues in favor of defendant.

It is argued that section 7845, supra, was controlling on the question of defendant's liability, and that the court erred in excluding it from evidence, in refusing plaintiff's instruction predicated thereupon and in withdrawing it from the consideration of the jury by defendant's second instruction. Plaintiff's theory is that this statute applies to the loss of a guest's property by accidental fire, as well as by theft or otherwise, and operates to make the innkeeper absolutely liable for property of a guest in his room to the value of $200, while permitting him to avoid liability for any sum beyond this amount by an affirmative showing that the loss occurred without fault or negligence on his part or on the part of his servants.

The statute invoked does not appear to have been construed by the appellate tribunals of Indiana; but a consideration of the entire act in question, and the

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state of the common law in Indiana prior to its passage, has convinced us that the statute does not, at any rate, apply to loss by "accidental fire," whatever change, if any, may have been wrought thereby. The statute does not seem to purport to create any new or additional liability not theretofore existing under the common law of Indiana; but be this as it may, it seems clear that it was not thereby intended to make an inkeeper absolutely liable—to the extent of $200—for a loss occasioned by accidental fire. Section 7844, supra, in terms applies to loss by theft. And while the word "theft" is not mentioned in the succeeding section, 7845, we think it apparent that in enacting this section as a part of the same act the lawmakers were dealing with losses of the last mentioned character. Furthermore, section 7845 relieves an innkeeper from liability for loss of property of a guest not within the room assigned to him, unless the same has been specially entrusted to the care and custody of the hotel keeper or his servants. From this we think it appears that loss by theft was intended to be covered, and not loss by fire as here. Plaintiff's learned counsel argue that there is a reason for this exemption where the loss is by fire as well as where it occurs through theft, in that in the event of fire the innkeeper and his servants may expect to find a guest's goods in his room when making an effort to save them from destruction. But in view of the difficulty ordinarily attendant upon rescuing goods from the various rooms of a hotel building, in case of fire, it does not seem reasonable to suppose that the Legislature would make the innkeeper's liability for loss by fire extend specially to goods in a guest's room. Other arguments advanced in this connection need not be discussed.

The case is one to be determined by the law of Indiana and not by that of this jurisdiction. And while there is a lack of harmony in the decisions of the courts of the various States as to the common-law liability of an innkeeper, under the law as declared by the decisions of the appellate courts of Indiana an innkeeper is not an insurer of a guest's goods but is prima-facie liable

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for loss or damages thereto—not occasioned by an act of God, the public enemy, or caused by the fault of the guest; and he may exculpate himself by proof that the loss was not occasioned by his fault or neglect, or that of his servants. [See Laird v. Eichold, 10 Ind. 212; Baker v. Dessauer, 49 Ind. 29; Bowell v. DeWald, et al., 2 Ind. 303.]

We are referred to no Indiana case involving a loss by accidental fire, and have found none. But taking the common law of Indiana as we find it, we regard it as entirely clear that defendant was here no more than prima-facie liable, and that plaintiff's refused instructions were erroneous in that they proceeded upon the theory that defendant was absolutely liable to the extent of $200 under each count.

In this connection it may be further noted that according to the weight of authority in this country an innkeeper is not liable for the destruction of his guest's property by "accidental fire," occurring without negligence on the part of the innkeeper or his servants. [See Merritt v. Claghorn, 23 Vt. 177; Vance, etc., v. Throckmorton, et al., 5 Ky. 41; Cutler et al. v. Bonney, 30 Mich. 259; Johnson v. Chadbourn Finance Co., 89 Minn. 310; Weeks v. McNulty, 101 Tenn. 495, 48 S. W. 809.] It is true that what is said as to this in Hulett v. Swift, 33 N. Y. 571—which was unnecessary to a decision therein—is opposed to this view; but that case, decided by a divided court, has been much criticised. [See Cutler et al. v. Bonney, 30 Mich. 259; Johnson v. Chadbourn Finance Co., 89 Minn. 310; Schouler on Bailments (1897), section 293.]

It is argued that even under defendant's theory of the law applicable to the case, defendant failed to carry the burden resting upon it, and that a verdict should have been directed for plaintiff. This argument proceeds upon the theory that in order to exculpate itself it devolved upon defendant to show the origin of the fire which caused the loss. We cannot accede to this view. The evidence is that the cause of the fire was undiscovered and unknown. But defendant adduced

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proof tending to show want of negligence on its part; tending in fact to show a very high degree of care to prevent fires and to extinguish them. This certainly sufficed to make it a question for the jury to say whether or not defendant had successfully carried the burden which the law cast upon it under the circumstances.

It follows that the judgment should be affirmed, and it is so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

ROBERT A. BURNS, Appellant, v. ADAM REIS, Respondent.

St. Louis Court of Appeals, February 6, 1917.

1. **CONTRACTS: Performance: Discretionary Matters.** The doctrine that, where the thing to be done under a contract does not pertain to articles of taste or fancy and it is stipulated that it shall be done to the satisfaction of one of the contracting parties, the party to be satisfied cannot act arbitrarily or capriciously, and that the law will say that he is satisfied with that which a contracting party ought to be satisfied, is by no means universally approved, but it may be said, broadly speaking, to have the sanction of the courts of this State.

2. **———: Reserved Right to Terminate: Construction of Contract.** A contract provided that B should procure plans for three or more houses to be built on eight lots owned by R, with capital to be furnished by the latter, and that B should superintend the construction thereof, and, upon completion, should use his best efforts to dispose of the same at prices to be approved by R. After providing for a division of any profits realized from these operations, the contract further provided that, upon the completion of three houses, should the continuance of building prove unprofitable, in the opinion of R, he should have the right to discontinue the building of any further houses. *Held*, that the matter for R to determine, in order to warrant the exercise of the right to discontinue, was whether it would be unprofitable to continue building on the land, under the contract, and not whether it would or would not be profitable to build on the land, under other arrangements, and it was sufficient, if, in arriving at such determination, he acted in good faith and with a just motive.

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3. ———: ———: **Rights of Promisor: "Good Faith."** Where a contract gives the promisor the right to discontinue, if, in his judgment, further operations under the contract would be unprofitable, a determination by him that the contract should be discontinued because this condition obtains, is conclusive, if he acts in good faith and with a just motive; "good faith" meaning that the determination must have some tenable ground to stand upon, and not rest alone upon dogmatic assertion.

4. ———: ———: ———: **Good Faith of Promisor: Sufficiency of Evidence.** A contract provided that B should procure plans for three or more houses to be built on eight lots owned by R, with capital to be furnished by the latter, and that B should superintend the construction thereof, and, upon completion, should use his best efforts to dispose of the same at prices to be approved by R. After providing for a division of any profits realized from these operations, the contract further provided that, upon the completion of three houses, should the continuance of building prove unprofitable, in the opinion of R, he should have the right to discontinue the building of any further houses. After the completion of three houses, R notified B that, in his opinion, it would be unprofitable to continue to build houses under the contract, and that, therefore, he had determined to discontinue the building of houses thereunder. R divided with B the profits on the three houses constructed, and thereafter he built five houses on the remaining five lots, from the sale of which he realized a profit. In an action by B for one-half of such profit, *held* that the evidence was sufficient to warrant a finding that R's opinion, that it would be unprofitable to continue to build houses under the contract, was formed in good faith, justifying his discontinuance of the operations under the contract, and hence it is *held* that a judgment for defendant was supported by the evidence.

5. ———: ———: ———: ———: **Instructions.** In such case, the court gave a declaration of law, that if defendant honestly and in good faith formed the opinion that, for him to continue with the erection of the remainder of the houses would be unprofitable, and, holding such opinion, he served notice thereof on plaintiff, plaintiff was not entitled to recover, even though the court should find that defendant formed such opinion from facts and circumstances which might not have induced the same opinion in the mind of some other persons, or the court, sitting as a jury. *Held*, that the latter portion of the instruction is a correct statement, though superfluous.

6. **Appellate Practice: Review: Weight of Evidence.** It is not the province of appellate courts to pass judgment upon the facts, in an action of law.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

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AFFIRMED.

S. T. G. Smith and *Thos. S. Meng* for appellant.

(1) The provision in the contract between the appellant and the respondent reading "should the continuance of building prove unprofitable in the opinion of said Reis, said Reis reserves the right to discontinue the building of any more houses on said land above mentioned and terminate this contract" did not, as a matter of law, give the respondent the right to cancel the contract in the face of the uncontradicted testimony that a profit had been made on the three houses, and the admissions in the answer of the respondent that a profit was made on the five houses. Berthold et al. v. St. Louis Electric Const. Co., 165 Mo. 280; Mullally v. Greenwood et al., 127 Mo. 138; Barnett v. Sweringen, 77 Mo. App. 64; Richison v. Mead, 11 S. D., 639; Keeler v. Clifford, 165 Ill. Rep. 544; Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387; Lilienthal Bros. v. Stearns, 121 Federal, 197. (2) Where the thing to be done under a contract does not pertain to articles of taste or fancy, and the contract provides that the thing to be done shall be done satisfactorily to one party, or the other, and the power of determining whether a thing is satisfactory to the other party is left to the one for whom the work is being done, the party to whom the determination of the question of being satisfied is left cannot act in an arbitrary manner, the law being "such satisfaction is not an arbitrary or capricious one. That which the law should say a contracting person ought to be satisfied with, that the law will say he is satisfied with." Berthold et al. v. St. Louis Electric Const. Co., 165 Mo. 280; Mullally v. Greenwood et al., 127 Mo. 138; Barnett v. Sweringen, 77 Mo. App. 64; Richison v Mead, 11 South Dakota, 639; Keller v. Clifford, 165 Ill. 544; Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387; Lilienthal Bros. v. Stearns, 121 Federal, 197. (3) Profitable in the opinion of the defendant means a price which would

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yield the defendant a reasonable profit over and above the gross costs of the land and the material, labor and other expenses connected with making up the total cost of the houses involved by the contract sued on. Rhodes v. Holladay-Klotz Land & Lumber Co., 105 Mo. 279. The opinion of the respondent that the continued building of houses under the contract sued on would prove unprofitable, must have been induced by such facts as would have induced the same opinion in the minds of reasonable persons having before them the same facts, and an opinion arrived at in any other manner is not arrived at in good faith and cannot be the basis for the cancellation of the contract sued on. Berthold et al. v. St. Louis Electric Const. Co., 165 Mo. 280; Mullally v. Greenwood et al., 127 Mo. 138; Barnett v. Sweringen, 77 Mo. App. 64; Richison v. Mead, 11 S. D. 629; Keeler v. Clifford, 165 Ill. Rep. 544; Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387; Lilienthal Bros. v. Stearns, 121 Federal, 197; Rhodes v. Holladay-Klotz Land & Lumber Co., 105 Mo. 279.

Wagner & Miller for respondent.

(1) The provision in the contract in suit that "should the continuance of building prove unprofitable in the opinion of said Reis, said Reis reserves the right to discontinue the building of any more houses on said land above mentioned and terminate this contract," gave the respondent a clear legal right at his own option to cancel the contract as to the unperformed part thereof and to build the remaining five houses himself, upon forming his opinion that the continuance of building with appellant would prove unprofitable to him; regardless of the facts that a profit had been made by them on the first three houses and that a profit was thereafter made by respondent on the remaining five houses, and regardless of whether respondent had any just cause or excuse for taking such action. 9 Cyc, "Contracts," pages 618-625, and cases cited and discussed in notes; Cann v. Rector, Wardens, Etc., 111 Mo. App. 164, l. c. 190-193, and cases cited at bottom of page

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192; Blaine v. Publishers Geo. Knapp & Co., 140 Mo. 241, and cases cited therein; Miller v. Pepperling, 185 Mo. App. 222; Nelson v. Von Bonnhorst, 29 Pa. St. 352; Allen v. Vose, 34 Hun. (N. Y.) 57. (2) Although not legally required to do so, respondent assumed and submitted to the trial court the issue of his good faith in terminating the contract. Such issue being one for the jury, the finding of the court, sitting as a jury, of the fact of respondent's good faith, upon competent evidence and under a proper declaration of law predicating such issue, operates as a special verdict and is conclusive on that issue. Miller v. Pepperling, 185 Mo. App. 222; Church v. Shanklin, 95 Cal. 626, 17 L. R. A. 207, and cases cited in L. R. A. note; Singerly v. Thayer, 108 Pa. St. 291, and cases cited; Cann v. Rector, Wardens, Etc., 111 Mo. App. 164, l. c. 190-193. (3) The third declaration of law, given for respondent, correctly states the rule of law governing the case and also predicates the issue of respondent's good faith so voluntarily assumed by him; and the finding and judgment thereunder, being based on ample evidence, are for the right party and should be affirmed.

ALLEN, J.—This is an action to recover damages for the alleged breach by defendant of a written contract entered into between plaintiff and defendant. The cause was tried before the court without the intervention of a jury, a jury having been waived, and resulted in a judgment for the defendant, from which the plaintiff prosecutes the appeal before us.

It appears that, at the instance of plaintiff, a member of a firm of real estate agents, defendant, who had retired from active business, contracted to purchase from a third person a tract of vacant land fronting on Kennerly avenue, a street in the city of St. Louis, in order that plaintiff might build small houses thereon and sell the same under contract with defendant. Thereafter, on October 11, 1909, a written contract was entered into between plaintiff and defendant, whereby plaintiff agreed "to procure plans, at his expense, for three or more

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one-story houses" to be built on said land, each on a lot of twenty-eight feet frontage, and "to invite bids and make contracts for the erection of same," all to be approved by defendant, and to fully superintend the erection thereof, submitting all plans and specifications to defendant for approval. The contract then contained the following paragraph, viz:

"Upon completion of three houses, said Burns (plaintiff) will use his best efforts to sell said houses at prices to be approved by said Reis (defendant), and should the continuance of building prove unprofitable in the opinion of said Reis, the said Reis reserves the right to discontinue the building of any more homes on said land above mentioned and terminate this contract, and make equal division of said profits with said Burns on the three houses already erected, first deducting price of land, cost of survey, and abstract of title, and after such discontinuance, this contract shall be null and void."

The contract then provided that, after reimbursing defendant for his investment in the land, with interest, and for "cost of survey" and "cost of certificate of title," the profits derived from the sales of the houses were to be equally divided between plaintiff and defendant; and that in case the profits should be represented wholly or in part by "deeds of trust or other negotiable paper," the same to be equally divided between the parties, if they could agree upon such division, otherwise the "total amount of notes" would be offered for sale and the proceeds equally divided. It was further agreed that plaintiff would pay for all advertising.

Thereafter defendant consummated the purchase of the land, which was subdivided into eight lots of twenty-eight feet frontage each. Building loans were then made on three of the lots, through the medium of a "straw man," and plaintiff proceeded to erect three houses upon these lots. These three houses were substantially completed by about April 1, 1910, though there is evidence that there were certain defects and deficiencies therein—

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a matter to which we shall later refer. About the time when they were substantially completed, they were sold to respective purchasers, in the manner and under circumstances to be hereinafter noticed. A settlement was had between plaintiff and defendant, as to these three houses, on August 13, 1910, at which time the notes and cash on hand were applied and divided in accordance with the contract, and it is conceded that a profit of $544.33 was thus realized on each house.

On April 22, 1910, the defendant notified plaintiff that it was defendant's opinion that it would be "unprofitable to continue the building of any more or further houses, or buildings, in accordance with the agreement;" and that defendant had "decided to discontinue the building of any more houses upon the land above mentioned, and to terminate and finally end the contract," which defendant declared was thereby terminated and ended.

Thereafter the defendant erected five houses on the remaining five lots of the tract mentioned. It is conceded that a short time prior to the giving of the notice to plaintiff above mentioned, defendant consulted the architect who, at plaintiff's instance, had prepared the plans for the first three houses, respecting the furnishing of plans for five additional houses to be erected on the remaining lots, which plans the architect afterwards furnished defendant. And it is conceded, also, that shortly prior to the giving of said notice defendant obtained from a planing mill company an estimate upon the "mill-work" for the additional five houses, though no contract was made therefor by defendant until May 6, 1910, when he contracted for the mill-work on three of these houses. Defendant admits that on each of these five houses, which were completed and sold prior to the institution of this action, he realized a profit of $500, making a total of $2500 profit on all thereof. They were of the same general character as the three houses built by plaintiff, but, it is said, were wider and differed somewhat in details of construction.

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Plaintiff's suit proceeds upon the theory that defendant breached the written contract aforesaid, the damages for such alleged breach being laid at $1250, one-half of the net profits realized by defendant from the sale of the five additional houses erected by him upon the remaining lots mentioned. It is unnecessary to notice the details of the pleadings, which are lengthy. The answer, admitting, among other things, that profits were realized on the three houses built by plaintiff, as above stated, and that defendant realized a profit of $500 on each of the five additional houses built by him, denies that defendant failed to comply with the contract on his part, averring, in substance, that in accordance with the terms of the contract defendant terminated the same because it was his opinion that it would be unprofitable to continue building operations as therein contemplated.

Upon the trial defendant testified at length as to his reasons for arriving at the opinion, said to have been formed by him, that to continue building operations under the contract, i. e., to allow plaintiff to continue with such building, would be unprofitable. This testimony, and other testimony adduced in defendant's behalf, was introduced for the purpose of showing that the circumstances, upon the whole, were such as to afford a tenable basis for an honest opinion that it would be unprofitable for defendant to continue under the contract, and to show good faith on defendant's part in seeking to terminate the contract on this ground. This testimony goes to show that plaintiff did not provide the plans for the three houses built by him, at his own expense, but that the cost thereof was put in as a part of the cost of construction; that plaintiff had no general contractor for the erection of the houses, but had a carpenter to superintend the work, who was not competent therefor, and that plaintiff himself merely visited the house daily, spending not to exceed thirty minutes per day on the premises; that the subcontracts were let to persons having desk-room in plaintiff's office, without the taking of other bids, over defendant's objections—though it appears that defendant afterwards approved these contracts; that in erecting the houses much de-

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fective work was done, and that defendant, who had had some little experience in building, spent much of his own time upon the premises in an effort to have the work done properly, in which effort he was opposed by plaintiff and the latter's workmen; and that when defendant complained to plaintiff of the defective and unworkmanlike work upon the houses plaintiff said: "The people who buy this kind of houses do not know any better."

The testimony as to the defects and deficiencies in the houses need not be here rehearsed in detail. It consists not only of defendant's own testimony but of the testimony of other witnesses as well, and tends to show that the brick walls, in part at least, were not properly constructed; that two of the three rear or kitchen doors were three or four inches too short for the frames so that it was necessary to "splice" them with wooden strips; that furnaces were defective, and that there were various other defects or deficiencies in the houses. It is also said that the rear yards were not filled to the proper level, and that defendant found it necessary to haul earth at his own expense to do such filling; that a granitoid sidewalk was made of insufficient width, and that certain other things to be done about the premises were improperly done or omitted.

And in testifying defendant said: "Mr. Burns not being there enough to superintend the houses, I did not want him to go ahead and build any more houses the same as they were built, for the reasons which I had; I thought that the houses not being all sold, being erected like they were, if they were not sold of course I would have the houses on my hands." Defendant also testified that upon concluding not to continue under the contract he offered to sell to plaintiff the remaining five vacant lots at the same, or about the same, price which he had paid for them, but that this offer was refused.

It appears that the three houses erected by plaintiff under the contract were sold on small cash payments, for $3333 each; each purchaser assuming a first deed of trust for $2000, and a second deed of trust to be

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paid off in installments. Of the three purchasers but one was procured by plaintiff's efforts. And to procure one of them defendant paid a commission of $50 to one Muren, a real estate agent. The purchasers all appeared as witnesses for defendant and testified as to defects and deficiencies in the houses and premises; and it appears that one of them—the purchaser procured by plaintiff—failed to keep up his payments, moved from the house which he had purchased and forfeited his title thereto.

The court, finding for defendant under the pleadings and evidence, gave certain declarations of law, at defendant's request, one of which is as follows:

"The court declares the law to be that if the court sitting as a jury finds and believes from the evidence that upon the substantial completion of the first three houses built upon defendant's land under the contract between them, the profits of which were divided between plaintiff and defendant, all as alleged and admitted in the pleadings, the defendant honestly and in good faith formed the opinion that for him to continue with the further performance of said contract, by the erection thereunder with plaintiff of additional houses on the remaining part of said land, would be unprofitable to defendant; and that holding such opinion defendant served upon plaintiff the notice, as alleged and admitted in the pleadings, that he had formed such opinion and had decided to discontinue building any more houses on said land and to terminate said contract; then, if the court so finds and believes, even although the court should also find and believe that defendant formed such opinion from facts and circumstances which might not have induced the same opinion in the mind of some other person or in the mind of the court sitting as a jury, plaintiff is not entitled to recover, and the finding of the court sitting as a jury must be for the defendant."

Plaintiff, appellant here, contends that the court erred in giving this declaration of law, and that under the admitted and undisputed facts in the case the finding and judgment should have been for plaintiff.

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The assignments of error may be reduced to these two contentions, and they may be considered and disposed of together.

Plaintiff's position, in general, may be stated to be that defendant could not arbitrarily cancel the contract, under the circumstances, but was required to act in good faith in seeking to terminate it under the clause thereof above quoted; and that the admitted and undisputed facts conclusively show that defendant could not have honestly and in good faith formed the opinion which he claims to have formed, but demonstrate that the notice served upon plaintiff for the purpose of terminating the contract, was not given in good faith, but for the fraudulent purpose of attempting to evade the obligations of the contract on defendant's part.

Plaintiff's learned counsel argues that where the thing to be done under a contract does not pertain to articles of taste or fancy, and it is stipulated that it shall be done to the satisfaction of one of the contracting parties, the party to be satisfied cannot act arbitrarily or capriciously in the matter; and that the law will say that he is satisfied with that which a contracting party under the circumstances ought to be satisfied. And in support of this are cited: Berthold et al., v. St. Louis Electric Const. Co., 165 Mo. 280, 65 S. W. 784; Mullally v. Greenwood, et al., 127 Mo. 138, 29 S. W. 1001; Barnett v. Sweringen, 77 Mo. App. 642; Richison v. Mead, 11 S. D. 639; Keeler v. Clifford, 165 Ill. Rep. 544; Duplex Safety Boiler Co. v. Garden, 101 N. Y. 387; Lilienthal Bros. v. Stearns, 121 Fed. 197.

This doctrine is by no means universally approved (see 9 Cyc., p. 618 et seq. and authorities cited), but it may be said, broadly speaking, to have the sanction of our courts. However, the case before us is not one where work has been done, or something has been furnished under a contract requiring that the same shall be done or furnished, to the satisfaction of the promisor. The action is for profits which plaintiff alleges he would have made had he been permitted to continue the building operations. And the contract, in terms, leaves it to

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defendant to determine whether or not, in his opinion, it would be profitable to continue building operations thereunder.

At this point we may say that we agree with defendant's contention (if the matter may be said to be seriously in dispute) that the contract must be interpreted to mean that defendant was to determine whether, in his opinion, it would be profitable to continue building on the land under the contract—i. e., to continue to allow plaintiff to erect houses thereon upder the contract —and not whether it would be profitable to build at all on the remaining lots.

The contract, indeed, does not in terms provide that plaintiff shall erect eight houses, one on each of the eight lots, but provides for the erection by plaintiff of "three or more one-story houses," and then proceeds to give defendant the right to terminate the contract, after the erection of the three houses, "should the continuance of building prove unprofitable" in his opinion. This must be taken to mean that defendant who furnished all of the capital, was to be the sole judge as to whether the circumstances as a whole surrounding the erection of the first three houses made it appear that it would be profitable to allow plaintiff to continue building operations or otherwise. Under the circumstances, all that could be required of defendant, we think, was that he act honestly and in good faith in forming his opinion on the subject. The argument is incidentally advanced by defendant's counsel that under the contract defendant had the absolute right to terminate the contract when he sought to do so, but defendant does not stand upon this, and we need not consider it since the case was tried below by defendant upon the theory that he was required to act in good faith.

To determine, or form an opinion, whether it would be profitable to continue under the contract or otherwise, involved the exercise of defendant's judgment in the premises. And it is said that where the fancy, taste, sensibility or judgment of the promisor is involved, "the promisee is practically debarred from questioning the

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ground of decision on the part of the promisor or investigating its propriety." Whether the cases from our courts have gone this far is a matter which we need not decide; but we regard it as altogether clear that they at any rate go to the extent of holding that under such circumstances it is sufficient, at least, if it appear that the promisor acted in good faith and with a just motive. [See Cann v. Rector, Wardens, etc., 111 Mo. App. 164, 85 S. W. 994; Blaine v. Knapp & Company, 140 Mo. 241, 41 S. W. 787.] And we may agree that good faith "must have some tenable ground to stand on" (Hess v. Watkins, —— Mo. App. —— 183 S. W. 351) and not rest alone upon the dogmatic assertion of the party required to exercise it. But in the case before us we regard the evidence adduced as affording a sufficient basis for a finding that the opinion said to have been formed by defendant was in fact formed in good faith, and his assertion thereof not merely a subterfuge to cloak an ulterior motive while evading liability on his contract.

It is true that profits were made on the three houses built by plaintiff, and on those subsequently built by defendant as well. But, in view of the evidence touching the matter, it does not follow that profits would have been realized on the additional houses had plaintiff been permitted to erect them, nor that defendant believed that such would be the case. According to defendant's evidence he had much difficulty with plaintiff respecting the building of the first three houses, particularly as to the workmanship thereupon. They had been sold, but small amounts only had been received in cash; and the purchasers were more or less dissatisfied, and one in fact forfeited his title. Defendant said that he feared that if plaintiff were permitted to continue to erect houses, built as were the first three, defendant would have the houses on his hands; and we cannot say that there was no ground for apprehension on this score.

Though profits then appeared to have been made on the first three houses, defendant might well have concluded that it would not be profitable to continue under the contract. And the contract itself appears to contem-

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plate the possibility that this very situation might arise, for it provides that if the contract be terminated by defendant, under the clause quoted, after the building of three houses, he is to "make equal division of said profits with said Burns on the three houses already erected."

We do not, of course, pass judgment upon the facts, for that is not within our province. But as to this phase of the case we merely hold that the record discloses sufficient evidence, of a substantial character, to sustain the finding of the trial court sitting as a jury.

What we have said above, in effect, disposes also of the contention that the trial court erred in giving the declaration of law quoted above; but perhaps we ought briefly to separately notice one attack thereupon. It is urged that the delaration of law is erroneous in declaring that if the court finds the facts as therein previously required, plaintiff is not entitled to recover, "even although the court should also find and believe that defendant formed such opinion from facts and circumstances which might not have induced the same opinion in the mind of some other person or in the mind of the court sitting as a jury." It is argued that defendant's opinion "must have been induced by such facts as would have induced the same opinion in the minds of reasonable persons having before them the same facts." This would make it a question for the jury to say what a reasonable man ought to have done under the circumstances of the case; whereas the contract explicitly leaves the matter to the opinion or judgment of the defendant. It is one thing to say that such opinion must be honestly formed, in good faith, and quite another to say that it must be such as a reasonable man would have entertained. We see no reversible error by reason of the addition of these words to the declaration of law, though they appear to be superfluous.

It follows that the judgment should be affirmed, and it is so ordered. *Reynolds, P. J.*, and *Becker, J.*, concur.

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BY J. L. FORT.

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1. **Appellate Practice.** The weight of and the effect to be given to the testimony, in an action at law, is primarily for the jury and then for the trial court, and the verdict will not be disturbed by the appellate court if it is supported by substantial testimony. Am. Union Tr. Co. v. Never Break Range Co., 206.

2. **Abstract.** Where error is charged in admitting in evidence an unsigned written memorandum and the appellant omits to include the paper in his abstract, the error cannot be noticed on appeal. Dreibelbiss v. Banner, 236.

3. **Recovery Upon Wrong Counts.** Although plaintiff was not entitled to recover upon the insurance counts, the judgment should not, in view of sections 1850 and 2082, be reversed, since the jury found that defendant was negligent, and the method of computing damages being the same under either theory, the award upon the insurance counts would have been the amount warded upon the negligence counts, and therefore the plaintiff was entitled to recover upon the negligence counts the amount awarded upon the insurance counts. Blackmer & Post Pipe Co. v. Railroad, 139.

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4. **Weight of Evidence.** It is not the province of appellate courts to pass judgment upon the facts, in an action at law. Burus v. Reis, 694.

5. **Conclusiveness of Finding.** A finding by the trial court, sitting as a jury, upon any controverted question of fact is conclusive upon the appellate court, if supported by any substantial evidence. Reynolds, Receiver, v. Title G. Tr. Co., 40.

6. **When Appellate Court Will Pass Upon The Evidence.** While it is not the province of the appellate court to pass upon the credibility of witnesses or the weight to be given their testimony, nevertheless where testimony cannot possibly be true, a finding by the trial court, predicated thereon, is not binding upon the appellate court. Ib.

7. **Inconsistent Position.** A claimant against an estate will not be heard to object, on appeal, that the newspaper publishing the notice of the granting of letters testamentary, as required by Sec. 82, R. S. 1909, as amended by Laws 1911, p. 79, was not a proper newspaper, where he himself put in evidence the affidavit of publication, as showing due publication of the notice, and the point is first raised in the appellate court. Albers Commission Co. v. Vogelsang, 180.

8. **Correct Result.** Although the trial court is in error in its conclusions of law, the judgment will nevertheless be affirmed, if it is in favor of the right party and for the correct amount. Rezabek v. Rezabek, 673.

9. **Vacation of Judgment.** The right to set aside a judgment rendered by the circuit court, in an appeal from a justice's court, defendant having failed to appear at the trial, is largely in the discretion of the circuit court, and will be interfered with only when such discretion has been abused. Munroe & Hornsby v. Manewal, 124.

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11. **Bill of Exceptions: Verity.** A bill of exceptions imports verity as it stands, and can alone be looked to by the appellate court concerning matters of exception, so that an assignment of error predicated upon a ruling, to which it is claimed an exception was duly saved, but which exception does not appear in the bill of exceptions, is not open for consideration by the appellate court. Hicks v. Life Insurance Co., 162.

12. **Refusal of Instructions.** The appellate court will not critically examine refused instructions, to determine whether or not they should have been given, where the party requested so great a number as to tend to produce confusion. McDonald v. Central Ill. Com. Co., 57.

13. **Motion for New Trial.** The objection that the verdict is contrary to the instructions is not available to appellant, where it was not called to the attention of the trial court in the motion for a new trial. Ib.

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2. **Substantive Right: Federal Court: Notice: State Court.** An attorney's lien is a substantive right given him by a State law and he may enforce it in a Federal court where the judgment was rendered. Or, if judgment be rendered in the Federal court and paid by defendant, with notice of the lien, the attorney may maintain an independent action in a State court against the defendant for deforcement of his lien. Ib.

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BILLS AND NOTES.

1. **Defenses: Failure of Consideration: Statute.** Under Sec. 9999, R. S. 1909, the absence of consideration for a promissory note is a matter of defense as against any person not a holder in due course. Rudolph Wurlitzer Co. v. Rossmann, 78.

2. **Sufficiency of Consideration: Benefit to Third Party.** It is not necessary that the consideration for a promissory note pass directly to the maker, but it is sufficient if it passes to a third party. Ib.

3. **Action: Equity: Mistake of Fact.** Mistakes of fact are not cognizable by a court of law in a purely legal action, equity having exclusive jurisdiction, by an action for reformation. Ib.

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BILLS AND NOTES—Continued.

4. **Defenses: Mistake in Signature.** In an action at law upon a promissory note, the fact that the maker, through mistake, signed a note so as to bind himself individually, instead of signing in a representative capacity, so as to bind his principal, is not available as defense; the remedy being in equity. Rudolph Wurlitzer Co. v. Rossmann, 78.

5. **Varying Terms: Mistake in Signature: Parol Evidence.** Parol evidence is not admissible, in an action at law, to vary or change the effect of negotiable instruments; so that, in an action at law on a promissory note, parol evidence, that the maker had, through mistake, signed a note so as to bind himself individually, instead of signing in a representative capacity, so as to bind his principal, was inadmissible. Ib.

6. **Mistake in Signature: Liability of Maker.** Where promissory notes, given for goods purchased by a corporation, were signed by the corporation by its president, followed by the signature of another person, with no official designation whatever, the latter signer was liable thereon to the payee, under Sec. 9991, R. S. 1909, although she was, in fact, the secretary of the corporation. Ib.

7. Where promissory notes given for goods purchased by a corporation were signed by its president as an individual, and by another with the word "Secy." affixed to her name, the notes containing no other reference to the corporation, the latter signer was liable thereon to the payee, under Sec. 9991, R. S. 1909, although she was, in fact, the secretary of the corporation. Ib.

8. **Courts: Rules of Decision.** Settled rules of law, governing commercial paper, cannot be set aside because their application in a particular case will result in hardship. Ib.

9. **Negotiation of Accommodation Note After Maturity: Diversion of Note: Rights of Accommodation Maker.** Where one of the makers of a promissory note signs for the accommodation of his co-maker and the note is negotiated after maturity, the transferee takes it, under Sec. 10028, R. S. 1909, subject to the defense that it was used for a purpose other than the one for which the accommodation maker signed it. Schlamp v. Manewal, 114.

10. **Sufficiency of Answer.** In an action against the two makers of a promissory note, one of the defendants averred in his answer that he signed the note for the accommodation of his co-maker, in order that the latter might have the note discounted at a certain bank, that it was understood that the note was to be so discounted for cash only, and that, when this was not done, the purpose for which the note was given failed, and upon its being negotiated by the co-maker to plaintiff, after its maturity, for stock in a corporation, there was a diversion of the note from its original purpose, which relieved the accommodation maker from liability thereon, *Held*, that the answer sufficiently pleaded the defense of diversion. Ib.

11. **Evidence: Negotiation of Accommodation Note After Maturity: Parol Evidence.** Parol evidence is admissible, in an action on an accommodation note negotiated after maturity, to show that the note was used by the accommodated party for a purpose other than that for which the accommodation party signed it. Ib.

12. **Indorsement by Stamp: "Written Indorsement."** The indorsement of the name of a corporation, payee of a promissory note, on the

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BILLS AND NOTES—Continued.

back thereof, by means of a rubber stamp, was a sufficient "written indorsement," under Secs. 10,001, 10,002, R. S. 1909, defining when an instrument is negotiated and providing that the indorsement must be "written," where there was substantial testimony that such indorsement was ratified by the officers of the corporation, and especially is this true in view of Sec. 10160, defining "written" as including printed and "writing" as including print. Am. Union Tr. Co. v. Never Break Range Co., 206.

13. **Indorsement in Blank.** Under Sec. 9980, R. S. 1909, promissory note indorsed in blank by the payee is payable to bearer. Ib.

14. **"Negotiation."** A promissory note payable to the maker and indorsed by him in blank is "negotiated," under Sec. 10,001, R. S. 1909 by sale and delivery to a third person. Ib.

15. **Purchaser: Sufficiency of Evidence.** In an action on a promissory note, evidence *held* sufficient to warrant a finding that one to whom the note was sent by the maker was the purchaser of the same. Ib.

16. **Bona Fide Holder: Instructions.** In an action on a promissory note, defended on the theory that the negotiation of the note was wrongful and in derogation of the rights of defendant, in that the note "was improperly, unlawfully, fraudulently and surreptitiously obtained from defendant," the court instructed the jury that if they found that defendant had delivered the note to one S. either as purchaser or as defendant's agent to effect a negotiation thereof, that S. delivered it to one B. for the purpose of enabling him to determine whether or not a bank with which he was connected desired to purchase it, and that plaintiff bought it from B, before maturity, for a valuable consideration and in the usual course of business, the jury should return a verdict for plaintiff, *unless they further believed from the evidence that, at the time plaintiff purchased the note, it had knowledge or notice that the negotiation of the note was wrongful and in derogation of the rights of defendant. Held,* that the italicized portion of the instruction is not vulnerable to the criticism that it permitted plaintiff to recover in the absence of *actual* knowledge or notice on its part that the negotiation of the note by B was wrongful. Ib.

17. **Appellate Practice: Conclusiveness of Verdict.** The weight of and the effect to be given the testimony, in an action at law is primarily for the jury and then for the trial court, and the verdict will not be disturbed by the appellate court if it is supported by substantial testimony. Ib.

18. **Instructions: Refusal: Covered by Other Instructions.** The refusal of a requested instruction is not error, where its substance is fully covered by the instructions given. Ib.

19. **Not Based on Evidence.** A requested instruction which is not supported by the evidence is properly refused. Ib.

20. **Sufficiency of Indorsement: Custom: Instructions.** In an action on a promissory note, executed by a corporation and payable to its own order, defended on the theory that the note was indorsed merely by the name of the corporation stamped with a rubber stamp, the refusal of a requested instruction, that if the jury found that it was "unusual and not customary" for bustiness corporations to use the name of the company stamped on the back of notes as an indorsement, then the name of defendant so stamped

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BILLS AND NOTES—Continued.

was sufficient notice that the note was not indorsed to make it the duty of plaintiff to investigate the authority under which such name was stamped, was properly refused, for the reason it omitted to state the facts necessary to establish a custom. Am. Union Tr. Co. v. Never Break Range Co., 206.

21. **Instructions: Custom.** An instruction which permits a finding to be predicated upon the nonobservance of a custom should state the facts necessary to establish the custom. Ib.

22. **Certificate of Protest by Notary.** The certificate of protest of an inland bill of exchange or note by a notary public establishes prima-facie proof of demand, refusal of payment and notice of dishonor necessary to fix the liability of the indorsers on a note. (Sections 6329, 10053, 10059, 10088, R. S. 1909.) Eaves v. Keeton, 424.

23. Formal protest by a notary, or other officer, of the dishonor of any negotiable instrument other than a foreign bill of exchange is not required under the Negotiable Instruments Act (Sec. 10088, R. S. 1909), yet same may be protested for non-payment and when so protested the notary's certificate is admissible and constitutes prima-facie evidence. Ib.

24. **Proof of Demand and Notice of Dishonor.** As to an inland bill or note demand of payment and notice of dishonor may be made by any one and the proof thereof may be made by oral or any competent evidence, regardless of formal protest. Ib.

25. **Notary's Certificate of Protest: Not Filed in Justice Court: Receivable in Circuit Court.** Action on a promissory note begun in justice court. The Notary's certificate of protest was not filed in that court but was first filed in the circuit after appeal to that court. Since trial in circuit court is *de novo* such certificate may be received in evidence when filed fifteen days before trial in that court and is not excluded by sec. 6329, R. S. 1909, requiring the certificate to be filed at least fifteen days before trial. Ib.

26. **Notice of Dishonor: What Sufficient.** The statute is complied with regarding notice of dishonor of a note (sec. 10075, R. S. 1909) when it is shown that notice was duly mailed, addressed to defendant, at his proper post office address, regardless of miscarriage in the mails. Ib.

27. **Indorsers: Order of Liability.** Indorsers, in respect to one another are prima-facie liable in the order in which they endorse. (Sec. 10038, R. S. 1909.) But evidence is admissible to show that they have agreed otherwise among themselves. Ib.

28. **Indorser: When One Considered.** One who places his signature on a note otherwise than as maker, drawer or acceptor, is deemed an indorser unless he clearly indicates, by appropriate words, his intention to be bound in some other capacity. (Sec. 10033, R. S. 1909.) Ib.

29. **Indorsement in Blank: Not to be Changed by Parol Evidence.** Where one indorses a note in blank he cannot by parol evidence show that he signed merely as an agent for a prior party and was not individually liable. Ib.

30. **Indorser's Address: Placed on Note: Notice Sent to.** Where an indorser places his post office address on the note and notice of

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BILLS AND NOTES—Continued.

dishonor is sent to such party at that address, this, under the statute is sufficient. (Sec. 10078, R. S. 1909.) Ib.

31. **Joint Indorsers: Liability.** One joint indorser who receives notice of the dishonor of a negotiable instrument is not discharged because of a failure to notify another joint indorser. Ib.

32. **Several Indorsers: What Notice Establishes Liability.** When there are successive indorsers, in order to hold any one of them liable it is not necessary to give notice to prior indorsers, notice to the last indorser being sufficient to hold him. Ib.

33. **Joint Indorsers: Liability.** Joint payees and indorsers who indorse are deemed to indorse jointly and severally. Ib.

34. **Notice of Prior Dishonor: Antecedent Parties.** Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after dishonor. (Sec. 10077, R. S. 1909.) Ib.

35. **Liability of Indorser: Prior Indorsers.** Any indorser to whom notice of dishonor is not given by the holder is discharged so far as such holder is concerned, but the party who is notified is thereby made liable to the holder and is given the right to protect himself by giving notice to those parties to the note from whom, on his paying the instrument, he is entitled to reimbursement. Ib.

36. **Liability of Indorser: Accommodation Indorser.** An indorser on a note cannot escape liability by showing that he received none of the proceeds and acted merely for the accommodation of one who desired to negotiate it. (Sec. 10000, R. S. 1909.) The holder parts with a consideration in the payment on the faith of the signatures thereto and that is sufficient consideration. Ib.

37. **Principal and Surety: When Surety Released by Act of Creditor.** Where a creditor gives a surety to understand that he will look to the principal debtor alone for payment, thereby causing the surety to forego taking security to protect himself and loss results to him, the surety is released. Bank of Neelyville v. Lee, 496.

38. **Estoppel: Applicable to Accommodation Makers and Indorsers of Note.** The doctrine and principles of estoppel apply to release signers of a note whether they are, under the Negotiable Instruments Law, accomodation makers or indorsers. Ib.

39. **Release of Sureties: Authority of Bank Cashier.** A bank cashier has no authority to release a surety on a note by mere contract or promise, but such bank may be estopped to collect from such surety by reason of the acts and representations of its cashier made in line of his duty. Ib.

40. **Banks and Banking: Bank Estopped by Cashier's Statements.** The cashier of a bank represented to sureties on a note who intended to take steps to secure themselves, that such steps were not necessary as the bank had taken a mortgage amply sufficient to secure all parties. The bank was estopped by the cashier's statements. Ib.

41. **Principal and Surety: Surety Released: To What Extent.** Where sureties on a note were released from liability to a bank because of statements of the cashier which caused them to refrain from taking securities to protect themselves, they were releases only to the extent to which they were damaged by being caused to refrain from taking security such as they could have obtained from the principal debtor. Ib.

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42. **Release of Surety: To What Extent.** The cashier of a bank represented to sureties on a note which it held that the bank had taken a mortgage which amply secured the notes. The mortgage was not enforced against all the property covered by it and the proceeds were not applied in payment of the debts secured. The securities were released to the extent of their loss occasioned thereby. Bank of Neelyville v. Lee, 496.

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1. **Statutory Forms: Common Law: Who May Recover on.** A bond which does not follow the term laid down by the statute or embody the prescribed conditions may, nevertheless, be good as a common law bond and may be sued on by any one for whose benefit it was made, whether named therein or not. Burton Mach. Co., v. Ruth, 459.

2. **Contracts: Who May Maintain Action on.** A third party may sue on a contract or bond entered into for his benefit though not named therein and not privy to the consideration where the obligees in the bond owe such party a duty of protection and the terms of the bond are sufficiently broad and specific to cover such duty. Ib.

3. **Valid if Not Violative of Statute or Against Public Policy.** A bond though voluntary and not authorized by any statute is valid if it does not contravene public policy nor violate any statute. Ib.

4. **Failure to Meet Statutory Requirements: May Be Good Under Common Law.** A bond taken by a public officer in attempted compliance with a statute may be good as a common law bond though it falls short of fulfilling the requirements of the statute. Ib.

5. **Contracts: Action on: Who May Maintain.** To enable third persons not named in a bond or contract to sue thereon it must appear by the terms of the contract or bond that they are of the class covered by the conditions of the bond. Ib.

6. **Public Officers: Neglect Duty: Individual Liability.** Where public officers are required by law to take a bond from contractors of public buildings for the protection of laborers and materialmen, a failure to take a bond good as a statutory or common law bond renders such officers individually liable in damages, the taking of such bond being a ministerial act. Ib.

7. **Contracts: School Buildings: Duty of Trustees to Require Bond of Contractor: Failure: Liability.** Action by materialman against school directors for failure to require from the contractor doing certain work a proper and sufficient bond conditioned for payment of material used as required by sec. 1247, R. S. 1909—amended Laws 1911, p. 106. The bond which the contractor executed is examined and deemed not to comply with the statutory requirements. *Held*, also, that the bond was not available as a common law obligation on which the materialman might sue and as the taking of the

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bond was a ministrial act the school trustees were liable for failure to demand bond in accordance with the statute. Ib.

8. **School Buildings: Failure of School Directors to Require Bond of Contractor: Liable, When.** The trustees of a school district did not require a contractor in the construction of a school building a bond complying with statutory requirements and the bond which they did require was not good as a common law obligation. The act required of the trustees by the statute was ministerial and the trustees cannot escape individual liability on the ground that the drafting, preparation and wording of the bond was judicial. Ib.

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BREACH OF PROMISE.

1. **Reiteration: Breach: Reconcilation.** A contract of marriage made during a protracted courtship, from the nature of the parties and of the courtship itself, is one that is constantly being restated or reaffirmed, but it is one contract, not separating into distinct agreements at each protestation. And if there be a breach followed by reconciliation and renewal of promise, the original contract continues. Dreibelbiss v. Banner, 236.

2. **Rescission: New Contract: Substitution: Seduction: Evidence.** A contract of marriage may be mutually rescinded like any other contract. If afterwards another engagement is made it would constitute a new agreement. But a refusal to comply by one and an institution of an action for damages by the other, and a reiterated promise by the former, immediately followed by a dismissal of the action and then another refusal followed by re-instituting the action is not a rescission; nor is it a substitution of a new contract for the old, and seduction following the first promise, but not repeated after the last, may be given in evidence on the second action. Ib.

3. **Instruction Former Chastity.** An instruction authorizing allowance of damages for seduction in a breach of promise action should include a hypothesis whether the plaintiff was formerly chaste. But if such hypothesis is stated in defendant's instructions it will suffice. Ib.

4. **Unsigned Memorandum: Abstract.** Where error is charged in admitting in evidence an unsigned written memorandum and the appellant omits to include the paper in his abstract, the error cannot be noticed on appeal. Ib.

5. **Excessive Verdict.** In an action for breach of promise where seduction and abortion appear together with a fraudulent renewal of the promise after once breaching the contract seven thousand and five hundred dollars is not an excessive verdict. Ib.

6. **Argument: Remarks of Counsel.** In the argument to a jury in an action for breach of promise it is not reversible error for counsel for plaintiff in referring to the defendant, to say, "If you remove his shirt you will find written plainly across his back 'without recourse.'" Ib.

CARRIERS.

1. **Common: Interstate Commerce: Limitation of Liability as Insurer: Shippers' Knowledge.** Where the duly published tariffs of a carrier

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CARRIERS—Continued.

set out two different rates for transporting an interstate shipment between two points, under the lower of which the carrier is not liable for breakage, a shipper who ships under the lower rate is conclusively presumed to know about the rates and the nonliability provision, and is precluded by such provision for recovering for breakage, in an action prosecuted on the theory that the carrier is liable as an insurer. Blackmer & Post Pipe Co. v. Railroad, 139.

2. **Damage to Shipment: Negligence: Sufficiency of Evidence.** In an action against a carrier for damage to an interstate shipment of sewer pipes, alleged to have been caused by the carrier's negligence, evidence that the pipes were heavy and hard to break, that, when properly packed in cars, they will stand considerable rough handling and will not break while being carried over even greater distance than the pipes in question were carried, that, when the pipes in question were placed in the cars, they were carefully examined and found to be in good condition, that they were properly loaded in the cars, and that, when they arrived at the destination, approximately one-third of them were broken, *held* to warrant a finding that the pipes were damaged while in transit, as a result of the negligence of defendant or its connecting carriers. Ib.

3. **Evidence: Relevancy: Harmless Error.** In an action against a carrier for damage to an interstate shipment of sewer pipes, alleged to have been caused by the carrier's negligence, the consignee's foreman testified that he had looked after the unloading of all cars of pipe shipped by plaintiff to such consignee during the year of the shipment in question, and that, at various times, he had seen the railroad allow cars loaded with tile to bump into other cars and that it had permitted cars to bump into cars he was unloading. On cross-examination, he testified that he did not know whether any of the cars involved in this case were thus handled. *Held*, that, while the testimony of this witness was not distinctly confined to the cars involved in this case, nevertheless it was for the jury to give it such weight as it deserved, and, even if it were incompetent, under the circumstances of the case, its admission would not be reversible error. Ib.

4. **Appellate Practice: Verdicts: Recovery Upon Wrong Counts: Harmless Error.** The petition, in an action against a carrier for damage to an interstate shipment, was in four counts; the first and third counting on the theory that defendant was liable as an insurer, and the second and fourth proceeding on the theory that defendant's negligence caused the damage. Plaintiff was not entitled to recover upon the insurance counts, but the trial court nevertheless submitted those counts to the jury, charging them that if they found for plaintiff upon those counts, they should return a verdict for defendant upon the negligence counts, or, if they should find for plaintiff upon the negligence counts also, their verdict thereon should be for nominal damages only. The verdict was for substantial damages upon the insurance counts and for nominal damages upon the negligence counts. *Held*, that, notwithstanding plaintiff was not entitled to recover upon the insurance counts, the judgment should not, in view of Secs. 1850 and 2082, forbidding reversals for errors not material, be reversed, since the jury found that defendant was negligent, and the method of computing damages being the same under either theory, the award upon the insurance counts would have been the amount awarded upon the negligence counts, had the jury not been limited to an award of nom-

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CARRIERS—Continued.

inal damages thereon, and the verdict was, therefore, in effect, a finding that plaintiff was entitled to recover upon the negligence counts the amount awarded upon the insurance counts. Ib.

5. **Common: Interstate Commerce: Illegality of Freight Rate: Jurisdiction of State Courts.** A complaint based upon the illegality or impropriety of the published freight rate for an interstate shipment is not within the jurisdiction of the State courts. Sunderland Bros. Co. v. Railroad, 154.

6. **Excessive Charges: Jurisdiction of State Courts.** Where a railroad company wrongfully exacts a freight charge for a shipment, in excess of the rate it advertises in its tariff sheets, a cause of action by the shipper to recover the excess is within the jurisdiction of the State courts, although the shipment is an interstate one. Ib.

7. **Long and Short Haul Clause: Tariff Construed.** Where the tariff sheet of a railroad company named freight rates from two points on its line to a common destination, within the same State, the higher rate being charged for the shorter haul, the further clause appearing in the sheet, that "on interstate traffic a higher rate must not be charged for a shorter than a longer distance over the same line, the shorter being entirely included within the longer distance," did not affect the named rates, and was not an offer to transport a shipment consigned to a point in another State, from the farther point, to such common destination, at the same rate charged from the point nearer the common destination, so as to authorize a recovery by a shipper for the difference between the two rates. Ib.

8. **Laws to be Read into Tariff Sheets.** The pertinent provisions of the Interstate Commerce Act are to be read into tariff sheets filed by carriers, relating to interstate shipments, and the State laws touching the matter become an integral part of such sheets, if applied to intrastate shipments. Ib.

9. **Contract for Less than Established Rate.** A carrier may not, under the law, by special contract with a shipper, or otherwise, bind itself to deviate from the established rate for an interstate shipment, duly promulgated and in effect. Ib.

10. **Interstate Commerce Shipment: Bill of Lading: Necessity for.** Whether the issuance of a bill of lading to the shipper by an interstate carrier is necessary to an action under the Carmack amendment to the Interstate Commerce statute, *quaere*. A remedy under that statute has been allowed in several States when no bill was issued. Cudahy Packing Co. v. C. & N. W. Ry. Co., 528.

11. **Pleading: Bill of Lading: Proof: Presumption.** Where a shipper plaintiff alleged in his petition for damages against the initial carrier under an interstate shipment, that the carrier issued to him a bill of lading and that he was the legal holder thereof, and this is denied in defendant's answer, the shipper must prove it or fail in his action. And a presumption that since the statute requires the carrier to issue a bill, it did so, will not supply the place of such proof. Ib

12. **Interstate: Presumption: Pleading.** An interstate carrier is entitled to a presumption that its business is being carried on in a lawful way, but that presumption cannot be substituted for proof where the shipper alleges in his petition that a bill of lading was issued to him by the carrier. Ib.

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CARRIERS—Continued.

13. **Evidence: Concealment: Presumption.** Where a plaintiff shipper has evidence of the fact, i. e., has possession of a bill of lading which he pleaded was issued and delivered to him by the carrier, he cannot hold back the bill of lading and rely on the presumption that the carrier complied with the statute directing bills of lading to be issued. Cudahy Packing Co. v. C. & N. W. Ry. Co., 528.

14. **Possession: Presumption.** When a party plaintiff is in possession of evidence of the fact, he cannot refuse to produce it and invoke a presumption as a substitute for such fact. Ib..

CARE. See **Telegraphs and Telephones, 14, 16, 17.**

CHANGE OF CONTRACT. See **Principal and Surety, 4, 6.**

CLOUD ON TITLE. See **Fire Insurance, 6.**

COMMON LAW. See **Bonds, 4; Innkeepers, 3, 4; Insurance, 8; Trial Practice, 3.**

CONTRACTS.

1. **Guaranty: Proposal: Interpretation: Ambiguity.** A contract of guaranty is composed of the proposal and the acceptance. The proposal is one sided and couched in the language of the guarantor and is therefore to be interpreted as strongly against him as the sense of it will admit. Sitron & Co. v. Friedberg, 379.

2. **Credit: Specific Sum: Liability.** A contract of guaranty reading that, ::In consideration of your firm extending credit to the Gary Clothing Company to the amount of five thousand dollars, I agree to be personally responsible," etc., should be interpreted to mean that the clothing company is to be given credit, if it asks it, in sums that will reach at least five thousand dollars; and if after extending credit for a part of that sum, further credit is wrongfully refused, the guarantor is discharged. Ib.

3. **Non-execution by Some of the Parties: Effect on Signatories.** Where a written contract is signed by some of the parties named therein, but not by all, the presumption is, that the writing took effect and was binding upon the parties who signed it, upon its delivery; and where one of the signatories attacks such contract on the ground it was not signed by all, the burden is upon him to show that, when he signed it, the intention and understanding was, that it should not take effect until signed by all. State ex rel. v. Laundry Co., 627.

4. **Estoppel: Acceptance of Benefits.** Parties who receive and retain the full benefits accruing to them under a written instrument which they signed and delivered as their contract, cannot be heard to repudiate its obligations on the ground that it was not signed by all the parties named therein. Ib.

5. **Res Adjudicata: Nonsuits: Conclusiveness of Judgment.** Although a judgment of nonsuit completely terminates and disposes of the particular suit, and is final in the sense that an appeal will lie therefrom, where the nonsuit is involuntary, nevertheless it is not a final judgment on the merits nor *res adjudicata* as to the cause of action, and this is true even though, on appeal by the plaintiff, the judgment of involuntary nonsuit is affirmed by the appellate court. Ib.

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CONTRACTS—Continued.

6. **Nonsuits: Legal Effect: Judgments.** The legal effect of a judgment of nonsuit is that of a judgment of discontinuance or dismissal whereby the merits are left untouched. Ib.

7. **Corporations: Sale of Corporate Stock: Breach of Contract: Measure of Damages.** The measure of damages for the breach of a provision in a contract for the sale of corporate stock, that the debts of the corporation did not exceed a stipulated amount, is an amount proportioned to the amount of such indebtedness in excess of the stipulated amount, in the ratio that the number of shares so sold bears to the number of shares outstanding at the time. Ib.

8. **Verdicts: Trial Practice: Computation of Liquidated Damages by Court: Harmless Error.** Notwithstanding Sec. 1993, R. S. 1909, provides that when a verdict shall be found for plaintiff, in an action for the recovery of money only, the jury shall assess the amount of the recovery, the giving of an instruction which directed the jury that, in the event they found for defendant upon his counterclaim seeking the recovery of money, they should find for him in a certain sum, was not reversible error, in view of Secs. 1850 and 2082, R. S. 1909, where the amount of such recovery did not exceed the amount to which defendant was entitled to recover as a matter of law, in the event the finding was for him, and interest thereon from the date of demand. Ib.

9. **Interest: Computation: Demand.** The institution of a suit constitutes a demand, and interest on the amount of recovery may be computed from such time. Ib.

10. **Performance: Discretionary Matters.** The doctrine that, where the thing to be done under a contract does not pertain to articles of taste or fancy and it is stipulated that it shall be done to the satisfaction of one of the contracting parties, the party to be satisfied cannot act arbitrarily or capriciously, and that the law will say that he is satisfied with that which a contracting party ought to be satisfied, is by no means universally approved, but it may be said, broadly speaking to have the sanction of the courts of this State. Burns v. Reis, 694.

11. **Reserved Right to Terminate: Construction of Contract.** A contract provided that B should procure plans for three or more houses to be built on eight lots owned by R, with capital to be furnished by the latter, and that B should superintend the construction thereof, and, upon completion, should use his best efforts to dispose of the same at prices to be approved by R. After providing for a division of any profits realized from these operations, the contract further provided that, upon the completion of three houses, should the continuance of building prove unprofitable, in the opinion of R, he should have the right to discontinue the building of any further houses. *Held*, that the matter for R to determine, in order to warrant the exercise of the right to discontinue, was whether it would be unprofitable to continue building on the land, under the contract, and not whether it would or would not be profitable to build on the land, under other arrangements, and it was sufficient, if, in arriving at such determination, he acted in good faith and with a just motive. Ib.

12. **Rights of Promisor: "Good Faith."** Where a contract gives the promisor the right to discontinue, if, in his judgment, further operations under the contract would be unprofitable, a determina-

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CONTRACTS—Continued.

tion by him that the contract should be discontinued because this condition obtains, is conclusive, if he acts in good faith and with a just motive; "good faith" meaning that the determination must have some tenable ground to stand upon, and not rest alone upon dogmatic assertion. Burns v. Reis, 694.

13. **Good Faith of Promisor: Sufficiency of Evidence.** A contract provided that B should procure plans for three or more houses to be built on eight lots owned by R, with capital to be furnished by the latter, and that B should superintend the construction thereof, and, upon completion, should use his best efforts to dispose of the same at prices to be approved by R. After providing for a division of any profits realized from these operations, the contract further provided that, upon the completion of three houses, should the continuance of building prove unprofitable, in the opinion of R, he should have the right to discontinue the building of any further houses. After the completion of three houses, R notified B that, in his opinion, it would be unprofitable to continue to build houses under the contract, and that, therefore, he had determined to discontinue the building of houses thereunder. R divided with B the profits on the three houses constructed, and thereafter he built five houses on the remaining five lots, from the sale of which he realized a profit. In an action by B for one-half of such profit, *held* that the evidence was sufficient to warrant a finding that R's opinion, that it would be unprofitable to continue to build houses under the contract, was formed in good faith, justifying his discontinuance of the operations under the contract, and hence it is *held* that a judgment for defendant was supported by the evidence. Ib.

14. **Instructions.** In such case, the court gave a declaration of law, that is defendant honestly and in good faith formed the opinion that, for him to continue with the erection of the remainder of the houses would be unprofitable, and, holding such opinion, he served notice thereof on plaintiff, plaintiff was not entitled to recover, even though the court should find that defendant formed such opinion from facts and circumstances which might not have induced the same opinion in the mind of some other persons or the court, sitting as a jury. *Held*, that the latter portion of the instruction is a correct statement, though superfluous. Ib.

15. **Appellate Practice: Review: Weight of Evidence.** It is not the province of appellate courts to pass judgment upon the facts, in an action of law. Ib.

CONSIDERATION—FAILURE. See **Bills and Notes, 1, 2.**

CONSTABLES. See **Replevin, 5.**

CONTRIBUTION. See **Principal and Surety, 8, 9.**

CONTRIBUTORY NEGLIGENCE. See **Master and Servant, 3, 4; Railroads, 7, 9, 11; Trial Practice, 2.**

CONSTRUCTION. See **Insurance, 1.**

CONTRACTS. See **Bonds, 2, 5, 7; Mechanics Liens, 7; Public Service Corporations, 3; Telegraphs and Telephones, 2.**

CORPORATE STOCK. See **Contracts, 7.**

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CORPORATE FUNDS—PAYMENT OF PRIVATE DEBT. See Corporations, 1.

CORPORATIONS. See Contracts, 7; Public Service Corporations.

1. **Officers: Payment of Private Debt with Corporate Funds: Liability of Recipient.** Where a check of a corporation drawn by an officer thereof, is by him tendered to his creditor in payment of his individual debt, the fact that the instrument upon its face purports to be drawn upon corporate funds under the officer's control is sufficient to put the creditor upon inquiry, and if such a check is accepted and used by the creditor, he runs the risk of being required to restore to the corporation the proceeds thereof; but this doctrine finds application only where the check is drawn upon funds actually belonging to the corporation and which the officer could not rightfully draw upon, whereby such funds are misappropriated. Reynolds, Receiver, v. Title, G. Tr. Co., 40.

2. **Appellate Practice: Conclusiveness of Finding.** A finding by the trial court, sitting as a jury, upon any controverted question of fact is conclusive upon the appellate court, if supported by any substantial evidence. Ib.

3. While it is not the province of the appellate court to pass upon the credibility of witnesses or the weight to be given their testimony, nevertheless where testimony cannot possibly be true, a finding by the trial court, predicated thereon, is not binding upon the appellate court. Ib.

4. In an action for money had and received, brought by the receiver of an insurance company which had never become fully organized nor obtained authority to transact business conformably to the insurance statute, a finding by the trial court that a loan obtained by the promoter of the company was made to the company, predicated upon evidence to that effect, was not binding upon the appellate court, for the reason that, such company never having become fully organized nor authorized to transact business, the evidence upon which the finding was based could not possibly be true. Ib.

5. **Promoters: Right to Act for Corporation Not In Esse.** A promoter of a corporation may not act as agent for it before it has corporate existence, since one cannot be the agent of a principal not *in esse*. Ib.

6. **Insurance: Insurance Companies: Organization: Existence: Statute.** Under Sec. 6900, R. S. 1909, providing that, whenever the corporators of an insurance company shall have filed with the superintendent of the insurance department the declaration of intention to form a corporation required by Sec. 6898, together with the proof of publication required by that section, such superintendent shall submit the declaration to the Attorney General, who, if he finds it in accordance with the law, shall so certify to the superintendent, who shall record the papers with the certificate, furnish a certified copy thereof to the corporators, and file a certified copy with the Secretary of State, who, on payment of the tax required by Sec. 2976, shall issue a certificate of incorporation authorizing the company to open books for subscriptions to its capital stock, and further providing that it shall be unlawful for the company to transact any business until it has fully complied with the article and Secs. 6901, 6902, providing for the steps to be taken, after the capital stock has been subscribed. to procure authority to transact business, the issuance to the corporators of the cer-

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CORPORATIONS—Continued.

tificate of incorporation does not give existence to the corporation, but it remains *in utero* until the capital stock is fully subscribed and authority to transact business is obtained in the manner provided by the statute; the "certificate of incorporation" merely having the effect of granting to the "corporators" the power to open books of subscription and take subscriptions to the capital stock of the proposed corporation. Reynolds, Receiver, v. Title, G. Tr. Co., 40.

7. **Insurance Companies: Payment of Promoter's Debt with Supposed Funds of Corporation: Corporation Not In Esse: Liability of Recipient.** The promotor of an insurance company deposited in a bank, in the name of the proposed corporation, funds individually procured by him. A certificate of incorporation was issued to the proposed company, pursuant to Sec. 6900, R. S. 1909, but the capital stock was not fully secured nor authority to transact business obtained, in the manner provided by Secs. 6901, 6902. The promoter paid his individual debt by means of a check drawn upon these funds, and the receiver of the company brought suit against the recipient of the check, on the theory that it was liable by reason of having accepted and used a check drawn upon corporate funds, in payment of the promoter's individual debt. *Held*, that the fact that the funds upon which check was drawn were held in the name of a company proposed to be incorporated and of which the promoter styled himself secretary, did not have the effect of constituting the funds corporate funds, and, by reason of the fact that the proposed corporation had never been authorized to transact business as an insurance company, it had no legal existence, and could not ratify or adopt the transaction so as to affect the character of the funds or become liable for the repayment of the loan by which they were obtained, and hence the receiver was not entitled to recover. Ib.

8. **Promoters: Fiduciary Relations.** The promoters of a corporation stand in a fiduciary relation to it, but it does not follow that all moneys belonging to or procured by a promoter which may be handled or dealt with by him during the promotion are impressed with a trust in favor of the corporation. Ib.

CORPORATE CONVEYANCES. See **Taxes, 10.**

CORAM NOBIS. See **Unlawful Detainer, 5.**

COUNTERCLAIM.

1. **"Set-off:" "Recoupment."** The terms "set-off" and "recoupment" are included in the term "counterclaim;" the difference in the two being important only by reason of the fact that the former must arise from contract and can be used only in an action founded upon a contract, while the latter may spring from a wrong, provided it arose out of the transaction set forth by the claimant or is connected with the subject of the action. Collins v. Leather Co., 611.

2. **Replevin.** A counterclaim may be interposed in an action of replevin, where it is founded upon a cause of action arising out of the contract or transaction set forth in the petition as the foundation of plaintiffs claim, or where it is connected with the subject of the action. Ib.

3. **Liens.** In an action to replevy hides tanned into leather by defendant for plaintiff, under a contract, where defendant sought to

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COUNTERCLAIM—Continued.

justify the detention on the ground it had a lien on the hides for compensation due for the tanning, it was proper for plaintiff, in his reply, not only to dispute the claimed indebtedness, but also to set up a counterclaim for a larger amount owing by defendant on indebtedness growing out of the contract on which the lien claim is founded, by way of set-off or recoupment, for the purpose of defeating the lien; and the rejection of evidence tending to establish such counterclaim was reversible error. Ib.

4. **Liens: Excessive Demand: Waiver of Lien.** The mere demand of an excessive sum by a creditor holding a lien on chattels for work performed is not a waiver of the lien for the sum really due; the artisan losing his lien only where he so mixes his accounts that his claim against the given property cannot be distinguished from other accounts. Ib.

CREDITOR'S BILL.

1. **Equity: Judgments: Subrogation.** Plaintiff obtained judgment against defendant Lee Smith, and an execution issued thereon was returned *nulla bona*. Thereupon plaintiff brought a creditor's bill seeking to subject land owned by defendants as tenants in common to the payment of the judgment, a past due note secured by a deed of trust on said land having been paid by said Lee Smith. *Held*, that plaintiff had a right to go into a court of equity to reach the interest of Lee Smith in the land and to have the latter's lien thereon subjected to the payment of plaintiff's judgment. Simpson v. Smith, 523.

2. **Payment by One Debtor: Burden of Proof.** When a debtor is compelled to pay in excess of his due proportion of a debt, there is an implied obligation, *ex contractu* that his co-debtors will pay their proportionate amount and the burden is upon the co-debtors to prove that they have discharged this obligation. Ib.

3. **Adequate Remedy at Law.** The right of a judgment creditor to reach the lien of the judgment debtor on the interest in land of his co-tenants created by reason of said judgment debtor having paid more than his share of a note secured by a deed of trust on said land, is a substantial and valuable one and one that could not be established by a court of law, and the fact that the judgment creditor might have run garnishments against said co-tenants does not give him a complete and adequate remedy at law, for the reason that, while their rights in the land might be reached under judgments against them as garnishees, the right of the judgment creditor would be subjected to any prior liens and all exemptions. Ib.

CROSSING. See **Railroads, 1, 2, 4, 6, 12, 14, 16.**

CUSTOM. See **Bills and Notes, 21.**

DAMAGES. See **Carriers, 2; Landlord and Tenant, 8; Master and Servant, 8; Telegraphs and Telephones, 2.**

1. **Actual and Punitive: New Trial: Right of Trial Court to Interfere with Award of Punitive Damages.** In an action for wrongful ejection of passenger from train, the jury awarded plaintiff $5 actual and $500 punitive damages. The trial court thought $100 punitive damages was sufficient and directed a remittur of $400, and, upon refusal of plaintiff to comply, granted a new trial. Since the de-

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DAMAGES—Continued.

cision of the Supreme Court in State ex rel. v. Ellison, 268 Mo. 225, a trial judge has the same power to order a remittitur in an award of punitive damages as in one of compensatory damages; and following that case as "the last previous ruling" of the Supreme Court, and in obedience thereto, the act of the trial judge in disgreeing with the jury as to the amount to be awarded for punitive damages, and in granting a new trial on plaintiff's refusal to enter the required remittitur, is upheld even though the award made by the jury was not so large as to be outrageous or induce the belief that the jury acted from partiality, prejudice or other improper motive. Smith v. Railroad, 349.

2. **Telegram: Mistake in Transmission: Action by Sendee: Basis of Suit.** A suit for damages by the sendee of a telegram for mistake in transmission is not on the contract between the sendee and the defendant, although the latter's duty to the sendee arose because that contract was created and performance thereof was undertaken by defendant, but is based upon the violation of defendant's duty to correctly transmit and deliver the message. This public duty the defendant owed the sendee even though the latter was not an immediate party to the contract, and hence the sendee has a right of action based upon the violation of that public duty. Poor Grain Co. v. W. U. Tel. Co., 557.

3. **Interstate Commerce: Governed by Federal Law.** A telegram, being from a point in one State to a point in another, is an interstate message and its transmission an act of interstate commerce. The interstate commerce statutes bring interstate telegraph companies within the terms and subject to all the provisions of the Interstate Commerce Law so far as applicable. And the rule of decision heretofore in force in this State respecting the force and effect of provisions in the contract by which a message is transmitted are no longer controlling with respect to interstate. Ib.

4. **Rates.** The assertion of the power of Congress over the subject of interstate telegrams and the duties of companies engaged in transmitting them expressly provide for uniformity of rate, of classification, and of service, and necessarily of responsibility therefor. Ib.

5. **Negligence in Transmission: Evidence.** In an action by the sendee of an interstate telegram against the company for mistake in transmission the evidence is examined and *held* to make out a prima-facie case of at least "ordinary negligence" as the term is used by the Federal courts for which a stipulation on the back of the telegram limiting liability provided. Ib.

6. **Stipulation: Measure of Damages: Reasonableness.** The sendee of on unrepeated interstate telegram, sent subject to a stipulation on the back of the message that the company shall not be liable for a mistake in transmission of any unrepeated message beyond the amount charged for sending the same, can recover only the amount paid for sending the message. The question of the reasonableness or of the real purpose and effect of such a stipulation is not open to the consideration of the State court, being a matter for the Interstate Commerce Commission to pass on. Ib.

7. **Drainage District: Governmental Agencies: Liability.** Although drainage districts are governmental agencies to the extent at least that they have all the elements of corporations formed to accom-

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DAMAGES—Continued.

plish a public use and purpose, yet they are not exactly like a county or a township, nor are they purely governmental agencies such as school districts. And where in the creation of a drainage district and its system of drainage, waters are collected and thrown in a body upon land adjacent to but outside of said district and no right to subject it to such overflow has ever been acquired in any way nor opportunity afforded for assessment of damages arising from the creation of said district, the district is liable for such damages. Otherwise such adjacent property is taken and destroyed without compensation in order that the district's public enterprise may be set on foot. Bruntmeyer v. Drainage Dist. No. 1, 360.

DAMAGES—STIPULATED. See **Damages, 6.**

DESERTION. See **Divorce, 5.**

DELIVERY. See **Life Insurance, 18.**

DEPENDENT MEMBER. See **Beneficiary Insurance, 1.**

DEMURRER. See **Statute of Limitations, 1; Trial Practice, 1.**

DEDICATION. See **Taxes, 6, 7.**

DEATH. See **Negligence, 7.**

DIVIDEND. See **Life Insurance, 22.**

DIVORCE.

1. **Former Judgment: Res Adjudicata.** Where, in a former suit by a husband for divorce, the judgment was against him, it is *res adjudicata* as to all acts of the wife prior thereto of which the husband had knowledge and could have offered evidence in support of, and will bar a subsequent suit based on the same grounds, in the absence of any facts subsequently occurring to create a new cause of action. Searcy v. Searcy, 311.

2. **Failure to Object to Evidence.** The evidence of such acts occurring before the former suit was admissible along with any subsequently occurring facts giving rise to grounds for divorce since they would emphasize and strengthen any such subsequent facts. Hence, the fact that defendant in the subsequent suit did not object to the introduction of the prior facts in evidence does not affect the right to apply the bar of *res adjudicata*, where, as soon as it was discovered that plaintiff was not relying upon anything new, the rule in bar was invoked. Ib.

3. **Suit for Alienation of Affection as New Ground for Divorce.** An amendment to a petition for divorce, offered after judgment and submission of a motion for new trial, alleging that since a former suit by plaintiff for divorce, defendant had begun a suit for alienation of affections without justification, in absence of evidence that the alienation suit was without justification, is insufficient to prevent the bar of the second divorce suit by the judgment for defendant in the former suit. Ib.

4. **Settlement: Admission.** That a wife accepted in settlement of her suit for alienation of her husband's affections a sum in consideration of which she released him from all obligations for maintenance and support, and released the defendants in the alienation

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DIVORCE—Continued.

suit, was no admission on her part that her suit had no justification. Searcy v. Searcy, 311.

5. **Desertion: Evidence.** Where a husband left because his wife objected to the presence of another woman in the home, and after he left he did not reveal to his wife his whereabouts though she tried repeatedly to ascertain where he had gone, he is not in a position to claim that his wife deserted him. Ib.

DRAINAGE DISTRICT. See **Damages, 7.**

DUE CARE. See **Railroads, 4, 5.**

EMERGENCY. See **Railroads, 15.**

ENDORSEMENT BY STAMP. See **Bills and Notes, 12, 13, 19.**

EQUITY. See **Bills and Notes, 3; Creditor's Bill, 1; Taxes, 2.**

1. **Interpleader: Trustee in Mortgage.** The trustee in a mortgage to secure corporate bonds who has sold the property under the mortgage and has administered the fund promptly and with dispatch as far as it could, and holds the remainder of the fund, over which contention is made, as a mere disinterested stakeholder ready to pay it to whomsoever it belongs, but not knowing to whom it belongs, and against whom one suit is brought and others are threatened, has the right to seek protection of a court of equity and have the rival claimants interplead, unless something has occurred or exists which, clearly and upon the plainest principles of justice, puts the trustee outside the pale of an equity court's consideration. Novinger Bank v. St. Louis Union Trust Co., 335.

2. **Partiality.** Evidence considered and *held* no to disclose partiality on part of a trustee. The fact that he failed to notice that one of a number of bonds was not in controversy and did not pay it over to the party entitled thereto but offered to pay the whole amount into court should not deprive him of the benefits of a court of equity since no harm has resulted to any one and the court can order the one uncontested bond to be paid over to the party entitled thereto and the interpleader had over the rest. Ib.

3. **Bill: Sufficiency: Need Not State Rival Claims.** A bill for interpleader need not state the facts upon which the rival claimants to the fund depend with the same particularity required of the claims when they filed their plea, but it is sufficient if the bill states the respective claims in such a way as to show that there is ground for them, and a reasonable doubt; as to where the money should go. Ib.

4. **Amount to Be Paid into Court.** Where all of the other bondholders in settling with the trustee on the distribution of the proceeds of the foreclosure sale reserved the question of their right to the distributive share of bonds held by a bank, the validity of which was questioned, the trustee is justified in paying into court the entire sum, though only part of the other bondholders had formally notified him that they questioned the validity of the bonds in dispute. Ib.

5. **Privity of Title.** All holders of bonds secured by a mortgage on corporate property assert a right to the fund resulting from a foreclosure, sale, which comes from the same source, and therefore

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EQUITY—Continued.

can be required to interplead as to their rights to the fund, though there is no privity in the title of the respective parties to the bonds held by them. Ib.

6. **Defenses: Dispute Over Amount: Interest in Fund.** A real dispute between the party seeking interpleader and those claiming the funds, is fatal to the right to have the claimants interplead. But the right to interpleader cannot be defeated by an unfounded assertion that there is more due from the trustee than is admitted by him and therefore an answer by way of cross-bill for interpleader, which alleges that the plaintiff in his complaint claimed more than was due, not in good faith, but solely to defeat defendant's right to an interpleader, is not demurrable. And a trustee under a mortgage securing corporate bonds does not, by paying the expenses of the sale, including the amount of the trustee's commission as fixed by statute, retain an interest in the fund which defeats his right to have the claimants thereto interplead. Ib.

ERROR—HARMLESS. See **Carriers, 3.**

ESTOPPEL. See **Bills and Notes, 40; Contracts, 4; Life Insurance, 11.**

EVIDENCE. See **Guaranty, 3, 4.**

EVIDENCE—HOLDING BACK. See **Carriers, 14.**

EXCESSIVE VERDICT. See **Verdict.**

EXPERIENCED SERVANT. See **Master and Servant, 4, 7.**

EXECUTIONS.

1. **Proceeding to Set Aside, Stay or Quash: Character of Proceeding.** A proceeding under Sec. 2244, R. S. 1909, providing for proceedings to set aside, stay or quash an execution, is not equitable in its nature, but is purely legal. Wallace Mfg. Co. v. Hagood Mfg. Co., 40.

2. **When Bond Necessary.** Sec. 2245, R. S. 1909, requiring a bond for a stay of execution, on motion to quash, applies only to a motion filed before a judge in vacation and not to such a motion, filed, heard and disposed of in open court. Ib.

3. **Payment of Judgment Debt: Effect.** A judgment creditor cannot successfully sue out an execution after receiving payment of his debt. Ib.

4. **Subrogation: Executions: Rights of Surety on Appeal Bond.** The surety on an appeal bond, who, upon affirmance of a judgment by the Court of Appeals, paid the judgment, taking an assignment thereof from the judgment creditor, was not entitled to an execution against the surety on the bond given by appellant upon appealing the case from a justice's court to the circuit court, since, in paying the judgment, the surety was merely discharging its own obligation, and the judgment creditor, having received payment of his debt, could not have successfully sued out execution on the judgment, and, for the same reason it was beyond his power to authorize any one else to do so in his name. Ib.

EXECUTORS AND ADMINISTRATORS.

1. **Right to Administer: Rights of Surviving Spouse.** The surviving spouse is given an unqualified right to administer upon the estate

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EXECUTORS AND ADMINISTRATORS—Continued.

of the deceased spouse, in the first instance, by Sec. 15, R. S. 1909, unless disqualified by Sec. 14, although, under Sec. 50 the letters may be revoked after a hearing, if ground therefor exists. State ex rel. Scanland v. Thompson, 12.

2. In view of the fact that under section 15, R. S. 1909, a widow who is not disqualified by section 14 has the absolute right to administer upon her deceased husband's estate, the fact that she was improvident, wasteful and extravagant, had no proper appreciation of the value of money, was a woman of immoral character, whose reputation for morality was bad, was deficient in integrity and business honor, was incapable of managing the estate advantageously or properly, and was hostile to the heirs and distributees, was not sufficient to defeat her right, in the first instance, to letters of administration; distinguishing State ex rel. v. Reddish, 148 Mo. App. 175. Ib.

3. **Renunciation: Antenuptial Contracts.** The right to administer upon an estate may be renounced, and such renouncement may be effected by an antenuptial contract executed in consideration of marriage. Ib.

4. **Mandamus: Renunciation of Right to Administer: Discretionary Determination.** The probate court acts judicially in determining whether or not the right to administer upon an estate has been renounced by one of those entited to priority, and, in the absence of an abuse of discretion, its action may not be reviewed or interfered with by mandamus; but the probate court is not permitted to act arbitrarily or abuse such discretion, and it cannot conclude the matter by a finding which is wholly unsupported by the evidence. Ib.

5. Where, in such a case, the return to an alternative writ of mandamus shows that the respondent judge found that the right to administer had been waived or renounced, and also sets forth all the facts concerning that matter, so that it affirmatively appears that the question turns entirely on a conclusion of law, the immunity from review by mandamus, which usually attends the exercise of a judicial function, does not necessarily obtain. Ib.

6. **Waiver: Elements.** Waiver is purely a matter of intention, and such intention may only be found from facts tending to prove it. Ib.

7. **Right to Administer: Renunciation of Waiver: Antenuptial Contracts.** A marriage contract between decedent and his widow, which awarded her five thousand dollars at the time of the marriage, and two thousand dollars per year so long as she continued his wife, and thereafter "barred her from his property," did not constitute a renunciation or waiver of the widow's right to administer upon decedent's estate, since the intention to renounce, which is essential to constitute a waiver, was lacking, and there was no renunciation, as the statutory right of a widow to administer upon her deceased husband's estate is not essentially a marital right in his property, but is rather the right to perform an office, through which, after paying the debts and other charges, the estate, less commissions, is eventually turned over to the distributees. Ib.

8. **Presentation of Claims: Special Statute of Limitations: Manner of Raising.** It is unnecessary in a proceeding in the probate court

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EXECUTORS AND ADMINISTRATORS—Continued.

to enforce a claim against an estate, to plead the statute limiting the time within which such claims must be presented (Sec. 191, R. S. 1909, as amended by Laws 1911, p. 81), but it is sufficient if the point be raised in such a way as to make it clear to the court and counsel that the personal representative is relying upon the statute. Albers Commission Co. v. Vogelsang, 180.

9. In a proceeding to enforce a claim against an estate, instituted in the probate court and taken to the circuit court by appeal, *held* that it sufficiently appeared, from statements of counsel for the executor and from an endorsement made by the trial judge upon the peremptory instruction given by him that the court and adverse counsel understood that the executor was relying upon the point that the claim was barred by reason of claimant's failure to present it within the time limited by Sec. 191, R. S. 1909, as amended by Laws 1911, p. 81, so as to make such point available as a defense. Ib.

10. **Trial Practice: Evidence: Effect of Attempted Withdrawal of Admissions.** Where plaintiff makes an admission of facts relied upon as constituting the defense, which it is not necessary for him to show to make out a prima-facie case, a subsequent announcement by him that he withdraws the admission will not have the effect of effacing the record that had then been made. Ib.

11. **Appellate Practice: Inconsistent Position: Estoppel.** A claimant against an estate will not be heard to object, on appeal, that the newspaper publishing the notice of the granting of letters testamentary, as required by Sec. 82, R. S. 1909, as amended by Laws 1911, p. 79, was not a proper newspaper, where he himself put in evidence the affidavit of publication, as showing due publication of the notice, and the point is first raised in the appellate court. Ib.

12. **Presentation of Claims: Statute of Limitations: Construction.** Sec. 191, R. S. 1909, as amended by Laws 1911, p. 81, barring claims against estate which are not presented within one year *from the date of letters*, where notice is published within ten days after the granting of letters, is not affected by Sec. 82, R. S. 1909, as amended by Laws 1911, p. 79, which gives the form of notice for publication, and states that if such claims are not exhibited within one year *from the date of the last insertion of such publication*, they shall be barred. Ib.

13. **Waiver.** The fact that an executor or administrator publishes a notice of the granting of letters, stating that claims will be barred unless presented within one year *from the date of last insertion of such publication*, pursuant to the form prescribed by Sec. 82, as amended by Laws 1911, p. 79, does not preclude him from asserting that claims are barred unless presented within one year *from the granting of the letters*, pursuant to Sec. 191, as amended by Laws 1911, p. 81, where such notice is published within ten days after the granting of letters. Ib.

EXPERT WITNESS. See **Life Insurance, 16; Master and Servant, 25.**

EXTRA WORK. See **Guaranty, 2.**

EXTENDED INSURANCE. See **Life Insurance, 10, 23.**

FALSE IMPRISONMENT.

1. **Bogus Checks: Evidence.** A woman of mature years, with a knowledge of the world, met a strange man on a street corner in a city

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FALSE IMPRISONMENT—Continued.

and permitted him to court her within twenty minutes. She shortly married him without inquiry as to where he lived or stayed. He was a drunken vagabond, without money and issued bogus checks which were cashed on her vouching for them. On the second day after the marriage she went with him to a retail store where she made large purchases of clothing, he paying for them in different bogus checks. She put on the clothing but before getting out of the store it was discovered the checks were fraudulent. The storekeeper had them both arrested and imprisoned for a day when she was discharged but he sent to the penitentiary. She brought suit for false imprisonment. It was *held* she did not make a case and a judgment in her behalf was reversed. Billingsley v. Kline Cloak Co., 534.

2. **Probable Cause: Allegation: Proof: Reasonable Ground.** If a plaintiff unnecessarily allege that a false imprisonment was without probable cause he must prove it; and if it appears at the trial that a reasonable and cautious man, in the circumstances, would have believed him guilty, the plaintiff fails. Ib.

3. **Husband and Wife: Crime: Presumption: Rebuttal of Presumption.** Though a wife is presumed to be so under the influence of her husband that she cannot commit a crime in his presence; yet this is a rebuttable presumption, and if the evidence shows that she took the lead and suggested and advised the criminal acts, the presumption is rebutted. Ib.

FEDERAL COURT. See **Attorney's Lien, 2.**

FIRE INSURANCE.

1. **Ownership of Property Insured.** The acceptance of a fire insurance policy containing a provision which declared it should be void and of no effect "if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground now owned by the insured in fee simple" is equivalent to a declaration that the insured was the unconditional and sole owner of the building insured and of the fee simple title to the ground, and that if such declaration were not true, the policy was void from the beginning. Terminal Ice & Power Co. v. Am. Fire Ins. Co., 241.

2. **Fee Simple.** The term "fee simple" has never been used to distinguish between legal and equitable estates, but to define the quantity and duration of estates and to denote the largest estate in land known to the law. Ib.

3. **Mortgage: Breach of Condition.** A mortgage being a mere lien on the land does not affect the quality of the fee simple estates of the mortgagor and until the mortgagee enters for breach of the condition, the mortgagor continues to be the owner of the estate and cannot be regarded as the owner of less than a fee simple title. Ib.

4. **Change of Ownership: Option on Property Insured.** Where the insured gives an option before a loss by fire occurs, to another to purchase the property insured, no breach of the provisions of the policy concerning changes of interest in the property insured, other than by the death, of the insured, is committed, such option not being exercised until after fire. Ib.

5. **Foreclosure on Sale of Property Insured: Policy Void.** The advertisement of property for sale under a deed of trust after a policy

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FIRE INSURANCE—Continued.

of insurance has been issued thereon, with the knowledge of the insured, renders the policy void, if it contained a provision to the effect that the policy shall be void "if, with the knowledge of the incurred, foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy by virtue of any mortgage or deed of trust." Ib.

6. **Cloud on Title.** The sale of the property insured under an execution, constituted only a cloud on the title, and not a complete transfer of the property, under the facts disclosed in this case, and the insured was not thereby prevented from recovering on the insurance policy the property having been destroyed by fire subsequently to the sheriff's sale. Ib.

7. **Notice of Encumbrance Waived.** The clause in a rider on a fire insurance policy providing that "notice of encumbrance waived" has no reference to the clause in the body of the policy providing that the policy should be void if foreclosure proceedings be commenced, or notice of sale given, under a mortgage or deed of trust. That clause refers to encumbrances and not to a sale, or notice of a sale under a mortgage or deed of trust. Ib.

8. **Waiver: Unearned Premium.** Where a provision in the policy provides that if the policy is cancelled or becomes void, the premium having been actually paid, the unearned portion shall be returned on surrender of the policy, and the insurer knew nothing of the ground of forfeiture until after the fire it cannot be deemed to have waived the forfeiture provisions of the policy by reason of the fact that it has failed to return the unearned portion of the premium, as the nature of this contest shows no indication of any surrender of the policy, but, on the reverse, an earnest effort to enforce it. Hence, the conditions have not yet arisen which would require the defendant to make a return of the unearned premium. Ib.

9. **Inspection of Property after Fire.** The provision in an insurance policy allowing insurer an inspection of the insured property remaining after the fire is a reasonable one for the protection of the insurer, and the right cannot be denied even though the damage was to furniture by water and falling plaster and the furniture has been dried and cleaned so that the furniture will not appear to be so badly damaged as it would if examined immediately after the fire. In other cases where insured has refused to allow inspection and has made it impossible to secure that right, such violation of the policy has been *held* sufficicient to prevent recovery thereon, but where the furniture is still where it can be inspected a new trial will be granted. Waughiman v. Nat. Ben-Franklin Ins. Co., 367.

10. **Pleading: Defective Petition: Cured by Verdict.** Although a petition could have been more carefully drawn, yet, unless it is so defective as to wholly fail to state any cause of action, it is not open to attack after verdict but is cured thereby. Ib.

11. **Trial: Evidence: Motion to Strike Out.** When a witness gives an answer that is unresponsive to the question asked which is a proper one, and the answer is such that it could not be anticipated, the proper practice is to move to strike out, and such motion cannot be denied on the ground that the party has waited to see what the answer would be before objecting. Ib.

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FIRE INSURANCE—Continued.

12. **Instruction.** Evidence, in a suit on a policy of fire insurance, that plaintiff suffered a daily loss to his business while interrupted by the fire is improper and exceedingly prejudicial when considered with reference to an erroneous instruction that in determining the amount of plaintiff's loss the jury should consider the difference between the value of the property before and after the fire and to "further consider what damages plaintiff may have suffered as a result of said fire. Waughiman v. Nat. Ben-Franklin Ins. Co., 367.

13. **Notice of Foreclosure of Deed of Trust.** The provision of a fire insurance policy that the policy shall become void "if with the knowledge of the insured foreclosure proceedings be commenced, or notice given of the sale of any property covered by this policy by virtue of any mortgage, or deed of trust," does not apply where notice of foreclosure was published before the issuance of the policy. Terminal Ice & Power Co. v. Com. Fire Ins. Co., 516.

FOREIGN LAWS. See **Innkeepers, 1, 2, 3.**

FORFEITURE. See **Life Insurance, 19.**

FORECLOSURE. See **Fire Insurance, 13.**

FREIGHT. See **Carriers, 5, 6.**

GAS MAINS. See **Public Service Corporations, 1, 2, 3.**

GOOD FAITH. See **Contracts, 12, 13.**

GUARANTY. See **Contracts, 1, 2.**

1. **Building Contracts: Construction of Guaranty: Matters Covered.** A guarantor of the performance of a building contract by the contractor is bound by the specifications referred to in the building contract, providing, *inter alia*, that the architect or owner should have the right, by written order, to order alterations and additions leaving the price therefor if not agreed upon, to be fixed by arbitration, notwithstanding the specifications were not mentioned in the contract of guaranty. Johannes v. St. Regis R. & Inv. Co., 43.

2. **Extra Work: Compliance with Contract: Burden of Proof.** Plaintiff, a materialman, brought suit to enforce a mechanic's lien. The owner filed a counterclaim, setting up that it had been compelled to spend a certain sum of money, in excess of the contract price, to finish the work, after the contractor had failed to do so, and that plaintiff was liable therefor under a contract by which he guaranteed the performance of the contract by the contractor. The building contract provided that the owner or the architect had the right, by a written order, to order alterations or additions to be made. It appeared that a large amount of extra work, not called for by the contract, was performed by the contractor, and the evidence as to whether or not such extra work was performed under a written order, conformably to the terms of the contract, was conflicting. Before the work was finished, the owner took the further execution and direction of it out of the hands of the contractor, and placed him on a *per diem basis*. Plaintiff contended that he was not liable under his contract of guaranty, for the reason that, in having the extra work performed without a written order and and placing the contractor on a *per diem* basis, there was a substantial variation of the contract, to his damage. *Held*, that, in order to establish its counterclaim, the burden rested upon defendant to prove that the extra work was ordered by a written order. Ib.

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GUARANTY—Continued.

3. **Sufficiency of Evidence.** In such action evidence *held* to support a finding that no written orders were given for the extra work as required by the contract, and that the doing of such work without such orders constituted a substantial variation of the contract, and hence plaintiff was not liable under his guaranty. Ib.

4. In such action, *held* that the placing of the contractor on a *per diem* basis was a substantial variation of the contract, since its effect was to change the contractor from the position of an employer to that of a journeyman, and that the evidence was not sufficient to show that plaintiff had knowledge thereof, and hence it is *held* that plaintiff was not liable under his guaranty. Ib.

5. **Cases Distinguished.** Lackland v. Renshaw et al., 256 Mo. 133, is distinguishable on the grounds, that the surety in that case was a corporation expressly organized to make bonds of suretyship for a consideration and a profit, and that the bond there involved was prepared by the surety company and was, under the general rules applicable in cases of that kind, to be construed most strongly against the drawer, neither of which conditions obtain in the case at bar; and that case, as well as City of Kirkwood ex rel. v. Byrne, 146 Mo. App. 481, is further differentiable on the ground that there, no damage resulted to the surety from the alterations, while here, the alterations were material and were prejudicial to the rights of the guarantor. Ib.

6. **Judgments: Entry: Sufficiency of Order.** Where the report of a referee recommended a finding for plaintiff on his claim, for a certain amount, and against defendant on his counterclaim, and after examining the testimony taken by the referee and hearing arguments on the exceptions filed by defendant, the court handed down a memorandum to the clerk, which merely contained the style and number of the case and the words "Report of referee approved," the judgment entered, conformably to the recommendation of the referee, could not be said to be the mere act of the clerk, since the order given to the clerk embodied in the memorandum handed down by the court, was tantamount to the pronouncement of the judgment recommended by the referee and warranted the clerk in entering up the judgment in that form. Ib.

HEALTH. See **Life Insurance, 2.**

HEIR. See **Beneficiary Insurance, 2.**

HIGH SCHOOL. See **Schools, 1.**

HOLDING COMPANY. See **Insurance, 8.**

IMPROVEMENT. See **Taxes, 2.**

INABILITY TO WORK. See **Master and Servant, 24.**

INJURY TO SERVANT. See **Master and Servant, 1, 21, 26, 29, 34.**

INSTRUCTIONS. See **Bills and Notes, 18, 21; Breach of Promise, 3; Contracts, 8, 14; Fire Insurance, 12; Landlord and Tenant, 4, 5; Libel and Slander, 2, 3, 4, 5; Master and Servant, 6, 9, 12, 27, 28; Mutual Benefit Insurance Societies, 4; Pleading, 3, 4, 5, 6; Replevin, 2.**

1. **Refusal: Covered by Others.** The refusal of an instruction is not error, where its substance is fully covered by other instructions. Am. Union Tr. Co. v. Never Break Range Co., 206.

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INSTRUCTIONS—Continued.

2. **Custom.** An instruction which permits a finding to be predicated upon the non-observance of a custom should state the facts necessary to establish the custom. Am. Union Tr. Co. v. Never Break Range Co., 206.

3. **Former Chastity.** An instruction authorizing damages for seduction should include an hypothesis as to whether the plaintiff was formerly chaste, but if defendant's instructions contains such hypothesis it will suffice. Dreilbelbiss v. Banner, 236.

4. **Liquidated Damages.** The giving of an instruction to the effect that in the event the jury found for the defendant upon his counterclaim seeking the recovery of money they should find for him in a certain sum was not reversible error. State ex rel. v. Laundry Co., 627.

5. **Honest Opinion.** If defendant honestly and in good faith formed the opinion that, for him to continue with the erection of the remainder of the houses would be unprofitable, and for that reason served notice on plaintiff, plaintiff was not entitled to recover, even if defendant formed such opinion from facts and circumstances which might not have induced the same opinion in the mind of some other person, was a correct statement. Burus v. Reis, 694.

6. **Evidence.** An instruction in a suit on a policy of fire insurance, that plaintiff suffered a daily loss to his business while interrupted by the fire, is prejudicial when considered with an erroneous instruction that in determining the amount of plaintiff's loss, the jury should consider the difference between the value of the property before and after the fire. Maughiman v. Nat. Ben-Franklin Ins. Co., 367.

7. **Harmless Error.** In an action by a landlord for injury to the freehold resulting from an advertising sign covering the outside wall of a building, which was painted thereon by defendant under permission from the tenant, an instruction for plaintiff covering the entire case and directing a verdict, but which failed to expressly require the jury to find that the property was substantially damaged by the sign, was erroneous, but the error should not work a reversal of the judgment in view of the fact that the jury found, under a correct instruction, that the property was substantially damaged by the sign. Kretzer Realty Co. v. Cusack Co., 596.

8. **Instructions: Cured by Others.** An instruction for plaintiff, covering the whole case and authorizing a verdict for plaintiff on a finding that defendant uttered the slanderous words, in the presence of one or more persons, and that they were false, without requiring a finding that they were heard by a third person, was erroneous, and the error was not cured by an instruction for defendant that if the slanderous words were understood by the hearers as terms of abuse, and not as an accusation, the verdict should be for defendant, for, where plaintiff's instruction purports to cover the whole case, its omission cannot be supplied. Boomshaft v. Klauber, 222.

9. **Assuming Disputed Facts: Referring to Pleadings.** An instruction which assumes a certain state of facts is true, or that a certain condition exists, is erroneous, where the evidence of one party affirms and that of the other party denies the existence of such state of facts or condition. An instruction which refers the jury to the pleadings for certain facts to be found is erroneous. Ib.

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INSTRUCTIONS—Continued.

10. **Applicability to Issues.** Instructions should not authorize a verdict on a theory of negligence not pleaded—nor should they assume facts in controversy—nor comment on the evidence. McDonald v. Central Ill. Con. Co., 57.

11. **Waiver.** If defendant wishes instructions on the measure of damages to be more explicit, he should make a request to that end. Ib.

12. **Review.** The objection that the verdict is contrary to the instructions must be called to the attention of the court in the motion for a new trial. Ib.

13. **Broadening Issues.** Instructions permitting a recovery should not be broader than the allegations of the petition. Stobile v. McMahon, 93.

14. **Safe Place to Work.** Where an instruction does not purport to cover the entire case and authorized a verdict for plaintiff unless the defendant furnished him a reasonably safe place to work instead of requiring defendant to exercise ordinary care to furnish him a reasonably safe place to work, is not necessarily erroneous. Ib.

15. **Waiver.** The jury were instructed that if the society accepted over due premiums after knowledge of the bad health of the insured, it was a waiver of a forfeiture provision—held erroneous. Davis v. Knights & Ladies of Security, 485.

16. **Assuming Facts.** An introduction is erroneous which assumes facts controverted by the evidence in the case. Van Zandt v. Wholesale Grocer Co., 640.

17. **Submitting Theory Not Proved.** An instruction which submits facts that are not proved is erroneous. Ib.

18. **Failure to Submit Defenses.** An instruction for plaintiff which purports to cover the whole case is erroneous, if it omits any reference to the defenses pleaded and in evidence. Ib.

19. **Agister's Lien.** An instruction given to the jury that while the horse was in the custody of the constable no lien accrued to the defendant for the keep of the horse during said time, was erroneous. Bermingham v. Carr, 411.

INTERPLEA. See **Equity, 1, 6.**

HUSBAND AND WIFE. See **False Imprisonment, 3.**

1. **Leasehold Property: Action by Husband against Wife for Accounting: Sufficiency of Evidence.** In an action by a husband against his wife, to have her declared a trustee for him as to a one-half interest in a leasehold, and for a judgment against her for one-half of the rents and profits received by her from such leasehold, *held* that findings of fact, upon which a judgment was rendered in favor of the husband for one-half of such rents and profits, were supported by the evidence. Rezabek v. Rezatek, 673.

2. **Personal Property.** An estate by the entirety may exist in personal property. Ib.

3. **Leasehold: Estate by Entirety.** A lease of real property to a husband and wife during coverture permits an estate by the entirety,

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HUSBAND AND WIFE—Continued.

so that, upon the death of the husband, the wife has no right of homestead in the leasehold; but takes the same by right of survivorship. Rezabek v. Rezabek, 673.

4. **Estate by Entirety: Leasehold: Renewal of Lease: Constructive Trusts.** A lease was made to a husband and wife for a certain period of time, with a provision for a renewal for another like period, and, pursuant to such provision, the lease was renewed. Prior to the expiration of the renewal, the wife applied to the lessor for a new lease in her name alone, falsely stating that her husband was crazed and was unwilling to renew. At this time the husband had a substantial interest in the leasehold, including the right to remove buildings from the demised premises, and, prior to the expiration of the lease, he attempted to renew the same. *Held*, that, in equity, the husband was entitled to the same interest in the new lease as he had in the previous one, namely, an estate by the entirety with his wife. Ib.

5. **Accounting for Rents.** Where a husband and wife held a leasehold estate as tenants by the entirety, and, while they were separated from each other, the wife collected the rents and income therefrom, the husband's personal representative was entitled to recover, in an action for an accounting against the wife, one-half of such rent and income so received by the wife, up to the time of the husband's death. Ib.

6. **Credit for Expenditures.** In an action by an administrator, against the wife of his decedent, for one-half of the rents and profits of an estate by the entirety in a leasehold, collected by her up to the time of the husband's death, *held* that each of the parties should be charged with one-half of an indebtedness they had incurred for the improvement of the leasehold property. Ib.

7. **Correctness of Accounting.** In an action by an administrator, against the wife of his decedent, for one-half of the rents and profits of an estate by the entirety in a leasehold, collected by her up to the time of the husband's death, *held* that the account between the parties was correctly stated by the trial court. Ib.
8. **Appellate Practice: Harmless Error: Correct Result.** Although the trial court is in error in its conclusions of law, the judgment will nevertheless be affirmed, if it is in favor of the right party and for the correct amount. Ib.

INNKEEPERS.

1. **Liability for Loss by Fire: Indiana Statute: Construction.** An act of the state of Indiana (Acts 1907, ch. 88), entitled "An Act defining and limiting the liability of hotels in respect to the effects of guests and providing for the disposal of unclaimed goods left in hotels," fixes in section 1 (Burns' Ann. St. Ind. 1908, sec. 7844) the liability of hotel proprietors for the loss of money, jewels and other valuables of a guest by theft. A subsequent section (Sec. 7845) declares that no hotel keeper shall be liable for loss of wearing apparel, goods, or merchandise for any sum exceeding the sum of $200, where it shall appear that such loss occurred without the fault or negligence of such hotel keeper, nor shall he be liable in any sum for the loss of any article belonging to such guests and not within the room assigned to him, unless it shall be specially entrusted to the care and custody of such hotel keeper. Under the common law of Indiana, innkeepers were not liable for losses resulting from accidental fires occurring without negligence. *Held*, that the latter

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INNKEEPERS—Continued.

section is intended to cover loss by theft, and not loss by fire. Treichlinger v. Hotel Co., 686.

2. **Loss Occurring in Another State: Laws Governing.** An action in this State against an innkeeper, for destruction of a guests's baggage by fire while in a hotel in another State, is governed by the laws of such other State. Ib.

3. **Common Law of Indiana.** Under the common law of Indiana, an innkeeper is not an insurer of a guest's goods, but is prima facie liable for loss or damages thereto not occasioned by act of God, the pu' lic enemy, or by the fault of the guest; and proof of the destruction of a guests's property by fire makes out only a prima-facie case of liability on the part of the innkeeper, which may be rebutted by proof that the loss was not occasioned by his fault or neglect or that of his servants. Ib.

4. **Common-law Rule: Weight of Authority.** According to the weight of authority in this country, an innkeeper is not liable for the destruction of his guest's property by accidental fire occurring without his negligence or the negligence of his servants. Ib.

5. **Exculpation: Sufficiency of Evidence.** In an action against an innkeeper for destruction of a guest's luggage by fire while in defendant's hotel in the State of Indiana, where defendant adducted evidence tending to show that he was not guilty of negligence, he was not bound to further show the origin of the fire, in order to exculpate himself. Ib.

INTERSTATE COMMERCE. See **Carriers, 1, 5, 10, 12; Damages, 3; Telegraphs and Telephones, 3, 8.**

INSURANCE. See **Corporation; Mutual Benefit Insurance Societies.**

1. **Construction of Policies.** The language employed in an insurance policy is to be construed in aid of the insurance, rather than to the end of defeating it, and the policy is to be given effect, if permissible, as if it was intended to cover and include the subject of the insurance for which the premium was paid, rather than to aid an escape from liability thereon. De Mun v. Insurance Co., 1.

2. **Landlord's Contingent Policy: Construction.** A "landlord's contingent policy" stipulated for indemnification against expenditures made by the owner of a building, in liquidation of claims for personal injuries sustained by reason of defects in the building or negligence of the owner, chargeable to him at law, provided he was not in the actual occupation or control of the building and that such actual occupation or control was vested in a lessee or lessees. The entire building was under lease to several tenants, some occupying more space than others, but every part of the habitable portions of the building was let to and occupied by tenants. The cornice of the roof fell and injured pedestrians on the street, and the owner settled the claims growing out of such injuries. In an action on the policy, insurer defended on the theory that the actual occupation or control of the cornice was not vested in the lessees, but that it was occupied and controlled by insured, so that the condition set forth in the policy, upon which the insurance was payable, did not obtain. *Held*, that this condition relates to the habitable portions of the building, and not merely to the roof or the cornice, and that insured did not "occupy" or "control" the roof or cornice with-

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INSURANCE—Continued.

in the meaning of the condition, and hence it is *held* that the policy afforded indemnification for the expenditures made in settlement of the claims. De Mun v. Insurance Co., 1.

3. **Negligence: Res Ipsa Loquitur: Falling Cornice.** The fall of a cornice from the roof of a building, on a quiet evening, when the speed of the current of air did not exceed three miles per hour, injuring a person on the street, would alone lead to an inference of neglect of duty, under the *res loquitur* rule, which would suffice as a prima-facie showing of negligence and cast upon the defendant the burden of rebutting it. Ib.

4. **Landlord's Contingent Policy: Prerequisite to Recovery: Defective Condition of Building.** In order to warrant a recovery under a "landlord's contingent policy," which stipulated for indemnification against expenditures made by the owner of a building, in liquidation of claims for personal injuries sustained by reason of defects in the building or negligence of the owner for which he was chargeable at law, provided, however, that he was not in the actual occupation or control of the building and that the actual occupation or control thereof was vested in a lessee or lessees, it was essential for insured to show that the defective condition of the building which caused the injuries existed at the time the tenants were given possession, since insured, as owner of the property, would not be "chargeable at law" for a defect that subsequently came into existence. Ib.

5. **Sufficency of Evidence.** In an action on such a policy, evidence *held* sufficient to support a finding that the building was in a defective condition at the time the tenants took possession of it, and that such defect constituted negligence on the part of insured, as owner of the property, which was chargeable to him at law, so as to make insurer liable, under the policy, for expenditures made by insured in liquidation of claims for personal injuries sustained by reason of such defects. Ib.

6. **Change of Ownership.** Where, at the time such a policy was issued, the building covered thereby was owned by the heirs of an estate, who thereafter formed a corporation to which the property was conveyed, the heirs being given stock representing their proportionate interests in the estate, one of them being made president and another secretary and treasurer, etc., and the policy was changed so as to make the corporation the assured, insurer was not relieved from liability for expenditures made by the corporation in liquidation of claims for personal injuries sustained by reason of defects in the building, negligently permitted to exist, on the theory that the building had been leased prior to the organization of the corporation and that it took title thereto subject to the leases, and, therefore, that it was not liable to the persons injured, since the organization of the corporation amounted to no more than encasing the estate in a corporate charter and neither in spirit nor in substance was there any change of ownership. Ib.

7. **Corporations: Holding Company: Rights and Liabilities.** Where the owners of property organize a corporation, to which the property is conveyed, and take stock therein, in proportion to their respective interests in the property, there is no change of ownership, either in spirit or substance, so that there is no change of rights or liabilities, with respect to the property. Ib.

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INSURANCE—Continued.

8. **Common Law: Operation.** The common law heeds the substance, rather than the shadow, of things. Ib.

9. **Theft: Automobiles: Value.** When an automobile is stolen from its owner, who has it insured against theft, and the car is located and recovered in another State and city by the Insurance Company, the Insurance Company's obligation does not end there, for they must return it to the owner with indemnity for damages to it, or pay the face value of the Insurance policy. A mere offer by the Insurance Company to turn the car in another State over to the plaintiff there and in addition to pay all damages by reason of theft is not a sufficient compliance with its Insurance policy, in order to defeat a recovery of the face value of the policy. K. C. Regal Auto Co. v. Old Colony Ins. Co., 255.

10. **Evidence: Waiver.** In order for an Insurance Company to show a waiver, by an owner of an automobile of its return to him so as to defeat a recovery for the face value upon a theft Insurance policy, it must do so by clear and distinct evidence that such a waiver was made. Ib.

INTERPRETATION. See **Contracts, 1.**

INTEREST ON DAMAGES. See **Contracts, 9.**

INTOXICATING LIQUOR.

Two Offenses: Instructions. Where the evidence for the State makes two prima-facie cases of a sale of liquor to two different persons and the evidence for defendant contradicts both, it is error to submit to the jury that they could find him guilty if they believed he sold one *or* the other. State v. Geist, 393.

JOINT TORTFEASORS. See **Master and Servant, 14; Unlawful Detainer, 1.**

JUDGMENT ENTRY—SUFFICIENCY. See **Guaranty, 6.**

JUDGMENT. See **Creditor's Bill, 1; Unlawful Detainer, 2, 4.**

1. **Appeal from Justice's Court: Failure of Defendant to Appear: Nature of Judgment.** A judgment rendered against the defendant by the circuit court, in a case appealed by defendant from a justice's court, upon evidence adduced by plaintiff, defendant failing to appear at the trial, was not a "default judgment." Munroe & Hornsby v. Doughtery, 124.

2. **Requisites of Motion to Vacate Judgment.** In order for the circuit court to set aside, on motion, a judgment rendered against the defendant, in a case appealed by him from a justice's court, defendant having failed to appear at the trial, it is necessary that the motion show that defendant had good reason for failing to appear and that he had a meritorious defense. Ib.

3. **Appellate Practice: Proceeding to Vacate Judgment: Discretion of Trial Court: Review.** The right to set aside a judgment rendered by the circuit court against the defendant, in a case appealed by him from a justice's court, defendant having failed to appear at the trial, rests largely in the discretion of the circuit court, and the appellate court will interfere only where it clearly appears that such discretion has been abused. Ib.

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JUDGMENT—Continued.

4. **Proceedings to Vacate: Sufficiency of Motion.** Defendant failed to appear in the circuit court, at the trial of a case which he had appealed from a justice's court, and the court, after hearing evidence, rendered judgment against him. He moved to set aside this judgment, setting up as a reason for his failure to appear at the trial, that he had employed, or believed he had employed, a certain named attorney to represent him, but that said attorney did not understood that he was so employed. *Held*, that the motion was insufficient, for if defendant did employ the attorney, his neglect would be defendant's neglect, and, in order to excuse defendant's default on the ground he "believed" he had employed the attorney, it was necessary that the motion show the *facts* upon which such belief was predicated, so that the court could determine whether or not such belief was justified. Munroe & Hornsby v. Dougherty, 124.

5. A motion to vacate a judgment must set out facts; conclusions being insufficient. Ib.

6. **Misunderstanding Concerning Employment of Attorney.** A defendant cannot ordinarily procure the vacation of a judgment against him, on the ground of a mistaken belief that he has obtained an attorney to protect his interests, but he must see to it that the attorney understands and accepts the retainer; otherwise his failure to personally see to the case is inexcusable. Ib.

7. **Attorney and Client: Neglect of Attorney.** The neglect of an attorney to look after a case is chargeable to his client. Ib.

8. **Justice's Courts: Failure to Give Notice of Appeal: Trial De Novo: Rights of Appellee.** Sec. 7584, R. S. 1909, providing that, where one appealing from a justice's court fails to give notice of appeal at least ten days before the second term of the circuit court after the appeal is taken, the judgment shall be affirmed or the appeal dismissed, at the option of the appellee, does not deprive the appellee of the right to waive the notice of appeal and enter his appearance in the circuit court and of having the cause tried *de novo*, pursuant to Sec. 7579, since the purpose of serving notice of appeal is to confer jurisdiction on the circuit court over the person of the appellee, and such jurisdiction is given by waiver of notice and entry of appearance by the appellee. Ib.

JUSTICE OF THE PEACE. See **Judgment, 1, 8; Statute of Limitations, 3, 4, 6, 7, 8.**

JURISDICTION. See **Replevin, 1; Unlawful Detainer, 1.**

JUDICIAL NOTICE. See **Telegraphs and Telephones, 15; Unlawful Detainer, 2.**

LANDLORD POLICY. See **Insurance, 2, 4.**

LANDLORD AND TENANT.

1. **Use of Outside Walls of Building: Rights of Tenant.** Although a tenant in possession is entitled to the use of the outside walls of the rented building and may delegate that use to a third person, he has no right to so use the outer wall as to injure the freehold, or for purposes inconsistent with the lawful and reasonable enjoyment of the property. Kretzer Realty Co. v. Cusack Co., 596.

2. **Advertising Signs: Liability of Third Party.** A third party who painted advertising signs on the outside walls of a building under

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LANDLORD AND TENANT—Continued.

permission from the tenant was liable to the landlord only in the event the sign substantially damaged the freehold, since the landlord has no right of action for trespass unless the freehold is substantially damaged thereby. Ib.

3. **Instructions.** In an action by a landlord for injury to the freehold resulting from an advertising sign covering the outside wall of a building, which was painted thereon by defendant under permission from the tenant, an instruction for plaintiff covering the entire case and directing a verdict, but which failed to expressly require the jury to find that the property was substantially damaged by the sign, as a condition precedent to finding for plaintiff, was, because of such omission, erroneous. Ib.

4. **Instructions: Harmless Error.** The error of said instruction was harmless, and should not, therefore, work a reversal of the judgment for plaintiff, under Secs. 1850 and 2082, R. S. 1909, in view of the fact that the jury found, under a correct instruction defining the measure of damages, that the property was substantially damaged by the sign. Ib.

5. **Instructions: Harmless Error.** In such case, an instruction for plaintiff that the tenant did not have authority to authorize, or grant to, defendant permission to paint a sign on said premises, while not accurately drawn must be taken to indicate that it referred to the sign involved in the case, and, although it was erroneous for failing to require a finding that the property was substantially damaged by the sign, nevertheless such error was not prejudicial to defendant, in view of the fact that the jury found that the property was so damaged. Ib.

6. **Appellate Practice: Punitive Damages: Instructions: Harmless Error.** An assignment of error predicated on the giving of an instruction authorizing punitive damages will not be considered, on appeal, where no such damages were awarded. Ib.

7. **Advertising Signs: Liability of Third Party: Damages.** In an action by a landlord for injury to the freehold resulting from an advertising sign covering the outside wall of a building, which was painted thereon by defendant under permission from the tenant, the measure of damages was the difference between the value of the property immediately before and immediately after the sign was painted, and evidence tending to show that the rental value was decreased by reason of the painting of the sign was admissible as tending to show that the value of the property was thereby substantially decreased. Ib.

8. **Damages: Evidence.** In such case, evidence that, after the sign had been painted, another building was placed on the lot, which covered up the sign, was properly excluded, since the measure of plaintiff's damages was the difference between the value of the property immediately before and immediately after the sign was painted, and any subsequent action of any person, which would increase or decrease the value of the property, would be immaterial. Ib.

LAWS—FOREIGN. See **Innkeepers, 1, 2, 3.**

LEASEHOLD PROPERTY. See **Husband and Wife, 1, 3, 4.**

LIEN. See **Attorney's Lien; Counterclaim, 3, 4; Mechanics' Lien, 2, 3, 4.**

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LIQUIDATED DAMAGES. See Contracts, 8.

LIABILITY—LIMITATIONS. See Telegraphs and Telephones, 4, 5, 6.

LIBEL AND SLANDER.

1. **Elements of Offense: Publication.** In order to constitute a slander, the slanderous words must be heard by some person other than plaintiff and defendant. Boomshaft v. Klauber, 222.

2. **Instructions: Cured by Other Instructions.** In an action for slander, an instruction given for plaintiff, covering the whole case, authorizing a verdict for her on a finding that defendant uttered the slanderous words of and concerning plaintiff, in the presence of one or more persons, and that they were false, without requiring a finding that they were heard by a third person, was erroneous, in that it did not require a finding of publication; and the error was not cured by an instruction given for defendant, charging that if the alleged slanderous words were understood by the hearers as mere terms of abuse, and not as an accusation, the verdict should be for defendant, for, where plaintiff's instruction purports to cover the whole case, its omissions cannot be supplied, nor its errors cured, by other instructions given. Ib.

3. **Instructions: Omissions Cured by Instructions.** Where an instruction given for the plaintiff covers the whole case and authorizes a verdict on the facts therein hypothesized, but omits to require facts to be found that are essential to sustain the cause of action, the error cannot be cured, nor the omission supplied, by instructions given for defendant. Ib.

4. **Assumption of Disputed Facts.** An instruction which assumed that a certain state of facts is true or that a certain condition obtains, is erroneous, where the evidence of the one party affirms, and that of the other party denies, the existence of such state of facts or condition. Ib.

5. **Referring to Pleadings.** An instruction which refers the jury to the pleadings for certain facts to be found, is erroneous. Ib.

LIFE INSURANCE.

1. **Failure to Attach Application to Policy: Effect.** Where the application for a life insurance policy is not attached to the policy, nor the substance thereof endorsed thereon, conformably to Sec. 6978, R. S. 1909, a defense predicated upon alleged misrepresentations made by insured in the application is not available to insurer, in an action on the policy. Hicks v. Life Insurance Co., 162.

2. **Policy Provisions: State of Health of Insured at Issuance of Policy: Statute.** A provision in a life insurance policy, that no obligation is assumed by insurer, unless, on the day of the issuance of the policy, insured was in sound health, is governed by Sec. 6937, R. S. 1909, so that such provision is unavailing to defeat the insurance, unless it appear that, at the time of the issuance or delivery of the policy, insured was afflicted with the disease which caused, or contributed to cause, his death, and whether or not such was the fact is a question for the jury, unless it be foreclosed by an admission of the plaintiff, which is wholly unexplained or unrepealed by any other evidence. Ib.

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LIFE INSURANCE—Continued.

3. **Question for Jury.** In an action on a life insurance policy, insurer defended on the theory that insured died from a malady with which she was afflicted at the time the policy was issued, and that, inasmuch as the policy provided that no obligation was assumed by insurer, unless, at the time of the issuance of the policy, insured was in sound health, the policy never became effective. The certificate of the physician who attended insured during her last illness, filed by the beneficiary as a part of the proofs of death, stated that insured had been suffering from the disease which caused her death, for several years prior to the date upon which the policy was issued. A sworn statement of beneficiary, also filed as part of the proofs of death, alleged that the duration of the last illness was about two months. The report of insurer's medical examiner showed that he found insured to be in good health and that he recommended her as a first class risk. Testimony was also adduced tending to show that insured appeared to be in good health at the time the policy was issued. *Held*, under the evidence, that the defense was not conclusively established, and hence, under Sec. 6937, the question was for the jury. Ib.

4. **Witnesses: Privileged Communication: Waiver.** Where a physician was placed on the stand by defendant, and, after his counsel had asked him a few preliminary questions, plaintiff's counsel interposed a general objection and then obtained permission to question him and propounded to him certain questions, plaintiff did not thereby waive the privilege granted by Sec. 6362, R. S. 1909, since her counsel sought merely to lay a foundation for his objection to the competency of the witness, later more fully made. Ib.

5. **Witnesses: Privileged Communication: Waiver.** The beneficiary of a life insurance policy is bound by a distinct provision in the policy whereby insured expressly waives the benefits of all laws disqualifying a physician from testifying concerning any information obtained by him in a professional capacity and expresses the intention to have such waiver apply to any person who may have any interest in or claim under the policy. Ib.

6. The beneficiary of a life insurance policy does not waive her privilege to claim the incompetency of decedent's physician as a witness, under Sec. 6362, R. S. 1909, by filing the certificate of such physician as a part of the proofs of death, pursuant to a clause in the policy providing that proofs of death shall be made on blanks furnished by the company and shall contain answers to each question propounded to the claimant, physician and other persons, and that all the contents of such proofs shall be evidence of the facts stated in behalf of, but not against, insurer. Ib.

7. **Evidence: Admissibility of Physician's Certificate.** A certificate of insured's physician, constituting part of the proofs of death, is admissible, in an action against the insurer, on the ground that the answers therein contained constitute admissions on the beneficiary's part, subject, however, to contradiction or explanation. Ib.

8. **Penalty for Vexatious Refusal to Pay: Sufficiency of Evidence.** In an action on a life insurance policy, *held*, that the evidence was sufficient to support an inference that insured's delay was unwarranted and vexatious, within the meaning of Sec. 7068, R. S. 1909, so that an allowance of ten per cent. damages and an award of an attorney's fee were warranted. Ib.

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LIFE INSURANCE—Continued.

9. **Appellate Practice: Bill of Exceptions: Verity.** A bill of exceptions imports verity as it stands, and can alone be looked to by the appellate court concerning matters of exception, so that an assignment of error predicated upon a ruling, to which it is claimed an exception was duly saved, but which exception does not appear in the bill of exceptions, is not open for consideration by the appellate court. Hicks v. Life Insurance Co., 162.

10. **Insurance: Policy Loan: Non-payment of Premiums: Right to Reinstatement: Extended Insurance Statute.** Insured's policies each contained a provision that "if there shall be an indebtedness to the company and if any premium shall not be paid on or before the date when due, an amount of insurance equal to the face amount of this contract less the indebtedness will automatically continue from said due date as insurance." They also provided for reinstatement by payment of all premiums where evidence of insurability was furnished. On policy loan agreements, which made the policy collateral, insured borrowed the full loan value of each policy and defaulted in the payment of premiums at a time when the indebtedness due exactly equalled the cash value. The company notified insured of this fact and suggested that he reinstate by paying the premiums and furnishing certificate of insurability. The insured offered to pay the premiums but refused to furnish the certificate of health and afterwards, without reinstatement or complying with the conditions necessary therefor, tendered the amount of the debt and demanded his policies. The tender was refused and insured died with matters in this shape. The policies were in harmony with and subject to the extended insurance statute which provided that after deducting from three-fourths of the net value of the policies the amount of indebtedness due the company, the balance should be taken as a basis for extended insurance: *Held*, that there was nothing on which extended insurance could be based, there being nothing in the policies or in the statute requiring the continuation of any further liability in the way of insurance; and that tender of payment of the debt did not give insured the right to extended insurance on the policies, nor was the company bound to reinstate insured until the conditions of reinstatement were complied with. McCall v. International Life Ins. Co., 318.

11. **Default in Premiums: Extending Insurance: Estoppel.** Because insurer urged insured to reinstate after forfeiture, pursuant to rights contained in the policy and in accordance with the terms thereof, did not estop insurer from applying the net value of the policies to payment of the loans secured thereby, leaving nothing on which extended insurance could rest. Nor did the designation of the policies as "lapsed" have any effect in that way, since the meaning of the term was that the policies were in suspension so long as the insured had a right to exercise the privilege of reinstatement conferred by and contained in the policies. Ib.

12. **Policy Loans: Pledge.** Loan agreements, showing on their face that they were made subject to provisions of life policies that insured could borrow on the sole security of the insurance contracts and that they should be assigned as security according to terms of loan agreements, are not loan and pledge contracts distinct and independent from the policies, giving insured right to extended insurance by repayment of loan after default in paying premium. Ib.

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LIFE INSURANCE—Continued.

13. **Reserve Value: Loan Agreement: Settlement.** A provision in a loan agreement that, upon default in paying premiums on policy pledged, the loan if unpaid may be foreclosed by satisfying the indebtedness, the balance if any to be applied to purchase extended insurance, is a reasonable means of settlement and not contrary to public policy. Ib.

14. **Insurance: Death from Accidental Injury: Evidence as to Cause of Death: Burden of Proof.** In a suit by the beneficiary on a policy of insurance against death by accidental means, where the claim is that insured inhaled a bug which induced pneumonia and thereby brought on his death, the burden is on plaintiff to show not only that such accidental inhalation occurred but also that insured's death came from that cause rather than from disease caused otherwise The cause of death cannot be left to conjecture. Freeman v. Loyal Protective Ins. Co., 383.

15. **Admissibility.** In a suit on an accident policy for death by accidental means, where the claim is that insured inhaled a bug which produced pneumonia from which he died, and there is no evidence showing with any degree of reasonable certainty that insured's death was caused by the inhalation except the doctor's opinion that it was, and they admit that if they had not been told of such inhalation, they could not say what was the cause of the trouble, the very life of plaintiff's case depends upon whether the testimony in relation to such inhalation is properly admissible under any exceptions to the hearsay rule. Ib.

16. **Opinion of Experts: Patient's Statement: Hearsay.** The evidence of plaintiff's experts as to insured's death from inhalation of a bug was not given in answer to hypothetical questions in which the truth of the claim of inhalation was assumed, nor was it based upon what they themselves found, but upon what the patient related to them concerning a past occurrence and in detailing his condition in the past. Such statements are hearsay, and the opinions of the experts based on them were improperly received. Ib.

17. **Res Gestae.** The evidence that insured's death was caused by the inhalation of a bug consisted solely of statements made some time afterward by him to others. The circumstances under which they were made are considered and held not to be such as to make them admissible as a part of the *res gestae*. Ib.

18. **Policy: Date: Delivery.** A policy of life insurance providing for payment of annual premiums in advance was dated one day and delivered on another. It was held that the date of delivery and the corresponding date each year were the dates upon which the premiums were to be paid. Hutchinson v. Nat. Life Ins. Co., 510.

19. **Premiums: Thirty Days' Grace: Forfeiture.** A life insurance policy provided that if any premium be not paid when due the policy should remain in force for thirty days, but if not paid by the expiration of that time should be void. It was *held* that where the premium was not paid during the currency of the thirty days, it should be counted as due as if there had been no thirty day provision. Ib.

20. **Days of Grace: Extended Insurance: Time.** Where a premium of life insurance is not paid within the days of grace allowed for its payment after default, the days of grace period should be counted in computing extended insurance. Ib.

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LIFE INSURANCE—Continued.

21. **Net Value: Reserve: Statute: Dividends.** The "net value" of a life insurance, as contemplated by section 6946, Revised Statutes 1909, is the reserve, and a dividend which has been declared but not paid does not become a part of the net value. Hutchinson v. Nat. Life Ins. Co., 510.

22. **Dividend: Premium: Additional Insurance.** Where a life insurance policy provided that a dividend declared and not drawn by the insured, should be credited on the next annual premuim to become due; or in the event that the assured paid the whole premium it should be applied to the purchase of additional insurance and the assured failed to pay the premium; it was *held* that the dividend would be applied automatically as a credit on the premium and would not become a part of the net value of the policy, nor would it be applied to the purchase of extended insurance. Ib.

23. **Extended Insurance: Dividends: Quarterly Premiums.** Where a life policy of insurance provides that the premium may be paid annually, semi-annually, or quarterly, it was *held* that the company could not be compelled to apply a dividend to the partial payment of a quarter and thus extend the insurance. Ib

LOAN. See **Life Insurance, 10, 12.**

LOOK AND LISTEN. See **Railroads, 18.**

MANDAMUS. See **Executors and Administrators, 4, 5.**

MAINTAINING. See **Telegraphs and Telephones, 9.**

MASTER AND SERVANT.

1. **Injury to Servant: Assumption of Risk: Making Dangerous Place Safe.** The rule, that the master is not liable to the servant for injuries sustained while engaged in making a dangerous place safe, has no application, where the servant has no supervision or control over the work of making the unsafe place safe, no duty to inspect, and no right to determine the time or manner of doing the work, is not his own boss, and is doing a mere detail of the work under the immediate control, orders and direction of a foreman, who has complete charge and control of the whole work. McDonald v. Central Ill. Con. Co., 57.

2. A servant never assumes the risk of his master's negligence. Ib.

3. **Contributory Negligence.** The fact that a servant had knowledge that the place in which he was working was dangerous, is a fact to be considered under a plea of contributory negligence; but such knowledge precludes a recovery on the ground of contributory negligence, only when the danger is so obvious that a man of ordinary prudence would have refused to work there, under the circumstances. Ib.

4. Although an experienced eye would have seen that the wall which fell upon and injured a servant who was engaged in shoring it up, was in immediate danger of falling, nevertheless, in view of the fact that the servant was utterly inexperienced and did not know that it was dangerous and the danger was not so obvious that a man of ordinary prudence would not have worked there, he was not guilty of contributory negligence as a matter of law. Ib.

5. **Instructions: Assuming Facts: Commentary on Evidence.** In an action by a servant for personal injuries, an instruction that, in

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MASTER AND SERVANT—Continued.

accepting employment, plaintiff assumed all the ordinary dangers pertaining thereto, "and, should the jury find from the evidence that the injuries sustained by plaintiff, if any, were the result of an accident, and not the negligence of defendants, as explained in other instructions, liable to occur in the performance of the work in which he was engaged but was a risk incident thereto," he could not recover, was not erroneous, as indicating the opinion of the trial judge as to the facts, nor as assuming that defendants were negligent. Ib.

6. **Instructions: Applicability to Issues.** Said instruction was not vulnerable to the objection that it authorized a verdict on a theory of negligence not pleaded, by indicating that if defendants were guilty of any sort of negligence, plaintiff could recover, and this is true notwithstanding another instruction gave the usual definition of "ordinary care" and charged that the "omission of such care is negligence, in the sense in which that word is used in the instruction;" the instruction not purporting to state the circumstances under which plaintiff might recover, but merely, in general terms, wholly favorable to defendants, narrowing the field of liability. Ib.

7. **Pleading: Inexperience of Servant.** In an action by a servant for personal injuries, an allegation in the petition that the place at which plaintiff was working was unsafe, that defendant knew, or by the exercise of ordinary care would have known, of such condition, and negligently sent him into the place to work, without protection or notice of any kind, although he was ignorant and inexperienced in the premises, and defendants knew that he was, and that plaintiff was injured "by reason of the negligence of defendants above mentioned," was a sufficient statement to warrant the admission of evidence of plaintiff's inexperience. Ib.

8. **Damages: Loss of Time: Instructions: Limitation.** In an action for personal injuries, the evidence tended to show that plaintiff was employed as a laborer at two dollars per day, at the time he was injured, and that that had been his vocation prior to that time, but that, subsequently, he did some work, the exact nature of which is not disclosed, in a small grocery store and also worked "at the butcher business." The instruction on the measure of damages permitted a recovery for the "loss, if any, of the earnings of plaintiff's work as a laborer, which the jury may believe from the evidence he has sustained by reason of his injuries; such earnings, if any, to be based on the rate not exceeding two dollars per day. *Held*, that defendants' contention, that plaintiff's recovery should have been limited to the difference between what he actually earned and what he should have earned, is drawing too nice a distinction in the use of language. Ib.

9. **Instructions: Waiver of Generality.** If the defendant wishes the instruction on the measure of damages to be more explicit, he should make a request to that end. Ib.

10. **Instructions: Refusal: Matters Covered by Other Instructions.** In an action by a servant for personal injuries, the refusal of an instruction, that plaintiff could not recover for permanent insomnia, was not reversible error, where the court instructed that plaintiff could not be allowed anything for permanent nervous injuries and shock, since the latter instruction sufficiently excluded insomnia, which is but a symptom of nervous injury and shock. Ib.

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MASTER AND SERVANT—Continued.

11. **Appellate Practice: Refusal of Instruction: Review: Excessive Number of Instructions.** The appellate court will not critically examine refused instructions, to determine whether or not they should have been given, where the party who asked for same requested so great a number of instructions as to tend to produce confusion and resultant error. McDonald v. Central Ill. Con. Co., 57.

12. **Review: Necessity of Raising Point in Motion for New Trial.** The objection that the verdict is contrary to the instructions is not available to appellants, where it was not called to the attention of the trial court in the motion for a new trial. Ib.

13. **Injury to Third Person: Scope of Servant's Employment.** The master is liable to a third person for torts committed by the servant, when it can be fairly implied that he was acting within the scope of his employment and was in the pursuit of the master's business and at the master's direction. Reber v. Bell Telephone Co., 69.

14. **Trespass: Joint Tortfeasors: Joint and Several Liability.** When a trespass is committed by co-operation, or by the joint act of two or more persons, each is liable for the injury done by all, and all who aid and abet in the commission are equally liable therefor. Ib.

15. **Telegraphs and Telephones: Use of Streets: Trees: Trespass.** A telephone company is entitled, as a *quasi* public corporation, to erect its poles along a street and string wires thereon, under license from the municipality, but this right is subject to that of abutting property owner to maintain trees projecting over the streets. Ib.

16. A telephone company desiring to string wires along a street, has no right to take the law in its own hands, and disfigure, mutilate and damage the trees of an abutting property owner at will, without being liable to respond in damages therefor. Ib.

17. It is the duty of a telephone company, desiring to string wires along a street, to take measures to mitigate or avoid damages to the trees of an abutting property owner, where practical, even though such measures are more expensive or less convenient. Ib.

18. **Defenses.** It was no defense to an action for damages against a telephone company for cutting shade trees, projecting over a street along which the company was stringing its wires, that the street commissioner of the city was present, giving orders and directions regarding such cutting, where it did not appear that he had authority to direct such cutting, nor that the branches were cut for any other purpose than to aid the company in the prosecution of its business in the way most convenient to it. Ib.

19. **Punitive Damages.** Where a telephone company seriously injured valuable shade trees which projected over the street, by cutting a space for its wires to pass through them, a verdict for punitive damages in favor of the property owner was justifiable. Ib.

20. **Damages: Punitive Damages: Necessity of Actual Damage.** Nominal actual damages will support a verdict for punitive damages. Ib.

21. **Injury to Servant: Res Ipsa Loquitur.** The *res ipsa loquitur* doctrine does not apply in an action by a servant for injuries sustained by reason of the master's negligence in furnishing him an unsafe place in which to work. Stobile v. McMahon, 93.

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MASTER AND SERVANT—Continued.

22. **Sufficiency of Petition: Petition Construed.** In an action by a servant for personal injuries, the petition alleged that defendant's foreman negligently allowed plaintiff's working place to become unsafe and dangerous by permitting a hoisting engine to be operated over plaintiff while he was performing work which he had been ordered by the foreman to do. *Held*, that the petition counts upon the theory that defendant failed to exercise ordinary care to furnish plaintiff a reasonably safe place in which to work, and does not invoke the *res ipsa loquitur* doctrine. *Held, further*, that the petition states a cause of action. Ib.

23. **Safe Place to Work: Duty of Master.** It is not only the duty of the master to exercise ordinary care to furnish the servant a reasonably safe place in which to work, but to keep it reasonably safe for him to perform the labor required of him. Ib.

24. **Damages: Liability to Work: Admissibility of Evidence.** In an action for personal injuries, evidence tending to show that plaintiff had not been working and had not been able to work since receiving his injuries, was admissible for the purpose of showing the permanency and extent of his injury and disability, notwithstanding the petition did not claim damages for loss of earnings; and the fact that the instruction on the measure of damages did not permit a recovery for loss of earnings shows that it was admitted for the purpose above stated only. Ib.

25. **Evidence: Expert Testimony: Opinions: Conclusions.** In an action for personal injuries, evidence by a physician that, in his opinion, plaintiff would not be able to do heavy lifting or to perform heavy work as he could before he was injured, was admissible as expert testimony, and was not objectionable as being the statement of a mere conclusion. Ib.

26. **Injury to Servant.** In an action by a servant for personal injuries, the petition alleged that defendant's foreman negligently allowed plaintiff's working place to become unsafe and dangerous by permitting a hoisting engine to be operated over plaintiff while he was performing work which he had been ordered by the foreman to do. An instruction for plaintiff permitted a recovery if defendant negligently allowed the place in which plaintiff was working to become dangerous, by "negligently allowing the hoisting machine *and bucket* to be operated near plaintiff." *Held*, that the instruction was not erroneous as broadening the allegations of the petition, by adding the words "and bucket" to the words "hoisting machine," since the "hoisting machine" described in the petition was composed of a cable and bucket operated by the engine. Ib.

27. **Instructions: Applicability to Issue.** Instructions permitting a recovery should not be broader than the allegations of the petition. Ib.

28. **Injury to Servant: Safe Place to Work: Instructions: Error Cured by Other Instructions.** In an action by a servant for personal injuries, the error in an instruction, which did not purport to cover the entire case and authorize a verdict for plaintiff, but merely dealt with the question of assumption of the risk, "that the law required defendant not only to furnish a reasonably safe place to work, but also required him to keep it so," instead of merely requiring defendant to exercise ordinary care to that end, was cured by the latter part of the instruction, which applied the instruction to the

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MASTER AND SERVANT—Continued.

facts of the case and charged that if the jury found that the defendant's foreman neglected (that is, failed to exercise ordinary care) to adopt suitable precautions for plaintiff's protection to keep his place of work reasonably safe, and plaintiff was injured as a result of such neglect (that is, failure to exercise ordinary care), plaintiff did not assume the risk of such injury. Stobile v. McMahon, 93.

29. **Duty of Servant to Take Precautions.** A master has a right to exact of the servant the intelligent use of his senses in performing his work and that he will take proper precautions for his own safety. Humphrey v. Lusk, 442.

30. **Duty of Master as to Tools: Cannot Be Delegated: Master Excused When.** The master owes to the servant the duty to furnish and keep reasonably safe the tools and appliances used by the servant. And while ordinarily such duty cannot be delegated to others, yet the master may require reasonable inspection by the servant and cannot be held liable for a servant's injury which is due to the servant's own failure to inspect the tools used. Ib.

31. **Defective Tools: Knowledge on Part of Servant: When Recovery Regardless.** Mere knowledge on the part of the servant of defects in tools and dangers in their use will not defeat recovery unless the peril is so obvious and glaring that an ordinarily prudent man would not use the tool and this is especially true where the master has promised to repair the tool. Ib.

32. **Use of Defective Tool by Servant: Master's Promise to Repair.** Where a servant seeks to excuse himself for using a tool known to be defective because of the master's promise to repair it, he must further show that the master's promise and assurance to repair were the inducing causes for continued use. Ib.

33. **Use of defective Tool by Servant: Authority of Person Making Promise to Repair.** Where a servant seeks to excuse his use of a tool known to be defective on the ground of the master's promise to repair same it must be further shown that the person making the promise has the real authority to represent the master in that respect or is held out by the master as having such authority. Ib.

34. **Servant's Injury: Master Not Liable: When: Evidence.** Action by servant against master for personal injuries occasioned by defective shears used by plaintiff in cutting iron for the master. There was evidence that the dull condition of the shears was made known to two other employees who promised to sharpen them. Evidence examined, conditions and scope of authority of the other two servants considered. *Held*, that the knowledge of the defective condition of the shears was not brought home to the master so as to permit him to have same sharpened as knowledge of the fellow workmen was not knowledge of the master: *held* further that the promise of future repairs was not made by one having authority to represent the master. Ib.

MATERIAL. See **Mechanic's Liens, 6.**

1. **Material Furnished: Statutory Rights.** A materialman who has furnished material which was used to build defendant's house may, by complying with the provisions of sec. 8217, R. S. 1909, compel defendants to pay out of such property the debt or such part of it as represents the reasonable value of the material furnished. And this

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MATERIAL—Continued.

is true although the land owners may have paid the contractor all that was due. Planing Mill Lumber & Const. Co. v. Krebs, 432.

2. **Requirements of Statute: Must be Complied With.** The Mechanics Lien statute is to be liberally construed, yet the rights thereunder are wholly statutory and depend on a compliance with the terms imposed by the statute which creates them. And to avail one's self of the benefits conferred by the statute one must comply with the substantial requirements of same. Ib.

3. **When Statement Sufficient.** A lien statement filed under the Mechanics Lien statute which is as definite as the contract under which the material was furnished or the labor done, will generally satisfy the requirements of sec. 8217, R. S. 1909. Ib.

4. **When Statement Not Sufficient.** A statement of lumber and mill work filed unler the Mechanics Lien statute giving the amount due with no other description of the material furnished and work done than "lumber and mill work as per estimates," where such estimates are not in substance incorporated in the statement, is not sufficient. Ib.

5. **Tranfer of Property: Notice.** B, while owner of the real estate contracted with a materialman for all the materials required for a residence thereon, and, in the midst of the construction thereof, conveyed the property to another. *Held*, that this did not affect the materialman's right to a lien as an original contractor even though most of the materials were delivered and built into the property after such transfer. The contract with the owner having been made and the delivery of the materials having commenced while B was such owner, the materialman was not bound to take notice of any subsequent conveyance of the property. Tull v. Fletcher, 573.

6. **Materials: Lienable Items: Laundry Posts.** Where a contract provided for the furnishing off all the materials required for the construction of a residence, an item for lumber used in constructing laundry posts in the yard constitutes a lienable item, as the improvements were for the purpose of transforming the lot into a residence, the posts were a part of those improvements, and, with the house and all other appurtenances permanently erected on the lot, formed one complete and entire affair, purchased under the same contract, and the whole formed one general improvement of the property. Ib.

7. **Contract.** Where a contract between an owner of property and a materialman provided that the materialman is to furnish the owner all the materials he requires for the improvement of the property, the materialman is bound to deliver all that the owner orders. Ib.

MISTAKE. See **Bills and Notes, 3, 6; Judgment, 6.**

MORTGAGE. See **Fire Insurance, 3, 5.**

MOTION FOR NEW TRIAL. See **Master and Servant, 12.**

MONEY HAD AND RECEIVED. See **Corporations, 4.**

MUTUAL MISTAKE. See **Negligence, 13.**

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MUTUAL BENEFIT INSURANCE SOCIETIES.

1. **Waiver of Laws by Officers: Statutory Powers to Prevent.** A mutual benefit society may by its constitution and by-laws under our statutes provide that none of its subordinate bodies nor its officers or members thereof shall have power or authority to waive any of the provisions of the laws and constitution of the society. (Laws 1911, p. 292, sec. 22.) Davis v. Knights and Ladies of Security, 485.

2. **Principal and Agent: What Law Governs Question of Agency.** The courts of every State and jurisdiction, either with or without the aid of some statute, deal with the question of agency under the general law and each court decides for its own jurisdiction what facts constitute one person the agent of another and the extent and limitations of the agent's power. Ib.

3. **Waivers: Provision Against by Constitution: Applicable to Foreign Corporations.** The statutory provisions (Laws 1911, p. 292, sec. 22) permitting mutual benefit societies to prohibit waivers by a subordinate lodge or its officers govern in actions brought in this State against foreign corporations regardless of the fact that the State where such foreign corporation was created recognizes such waivers. Ib.

4. **Instructions: Waiver: Forfeitures.** In an action against a mutual benefit fraternal society the jury was instructed that if the society accepted overdue premiums and retained them after knowing of the bad health of the insured, such retention was a waiver of the forfeiture provision. The instruction was erroneous because it did not limit such action to the national council and its officers instead of the local organization. Ib.

5. **By-law Provisions: Constructions.** Defendant mutual benefit society had a by-law providing that the retaining of an assessment should not waive any by-law provision until demand had been made for the return of the premium. Such provision only authorized retaining such payment during sufficient time for a reasonable investigation of facts. Ib.

6. **Forfeiture Waiver by Retaining Payment.** Where the governing body of a mutual benefit society retained an assessment for several months and did not offer to return same, with full knowledge of the facts all the while, it thereby waived a provision forfeiting policies for failure to pay assessments promptly. Ib.

7. **Waiver as to By-law Provision.** When a waiver is once made by a mutual benefit society as to provisions in its by-laws such waiver cannot be recalled. Ib.

NEGLIGENCE. See **Carriers, 2; Damages, 5; Innkeepers, 1, 2; Insurance, 3; Railroad, 8, 17; Telegraphs and Telephones, 20; Trial Practice, 2.**

1. **Street Railways: Sudden Jerk of Car.** The plaintiff, while in the act of alighting from the defendant's street car, was thrown therefrom by a sudden jerk of the car and was injured. He was standing on the running board of the street car with his right foot suspended over the street, but not holding to the car with his hands, and just as his right foot was about to touch the ground the car jerked forward, so that his right foot, touching ground, acted as a pivot, causing him to spin around and fall backward with his head in the direction the car was going, striking the

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NEGLIGENCE—Continued.

pavement on his back and side. *Held*, that the cases of Scroggens v. Railway, 138 Mo. App. 215 and Daniels v. Railway, 177 Mo. App. 215, in which is set out the doctrine relating to falls from a street car against the natural law of force and gravity, does not apply in this case. The appellate courts have carefully refrained from extending the rule in these two cases. Middleton v. Railways, Light, Heat & Power Co., 258.

2. There is no arbitrary doctrine that can be laid down by appellate court stating that a human body may be projected in any given direction, when the court is not in a position to know of the intensity or suddenness of the jerk of the car, or of the quality of the other forces that were brought into play at the time. Ib.

3. **Shop-keeper: Box of Merchandise: Liability.** A shop-keeper had a box of heavy goods unloaded on the sidewalk in front of his place of business. It was six feet high, three feet wide and about one foot and a half thick. He caused it to be leaned up against the building with the bottom so close to the building as to make its position insecure. Plaintiff's child was running by when the box toppled over and killed her. The shop-keeper was *held* liable; and it was further *held* that the rule of *res ipsa loquitur* was applicable. Duffy v. McGee, 395.

4. **Res Ipsa Loquitur: Presumption.** When an occurrence takes place which, in the ordinary course of things does not happen if those who have the management of the place use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that it arose from want of such care. Ib.

5. **General Charge.** A charge of general negligence admits of the application of the rule of *res ipsa loquitur*. Ib.

6. **Damages: Carrier and Passenger: Crowded Street Car.** A carrier of passengers operating a car, so densely and greatly over-crowded that some were compelled to stand on the steps and hold to the handrails, must see that the car is managed with the highest degree of care which these circumstances called for. A car, thus loaded and with passengers on the steps, was proceeding moderately along the street when it suddenly gave an unusual and violent jerk which threw a passenger off and killed him. *Held*, that such unusual and violent jerk occurring under those circumstances was prima facie unnecessary and negligent. Cooley v. Dunham, 399.

7. **Death Statute: Suit by Administrator: Pleading: Petition: Evidence: Demurrer.** In a suit by an administrator for the benefit of the heirs of an unmarried adult under the fourth clause of section 5425, R. S. 1909, a demurrer to the evidence cannot be sustained on the ground that the petition states no cause of action in that there was no allegation to show that the beneficiaries—a father, mother and sister—had suffered a pecuniary loss by the death of the deceased. While the petition contained no such allegation, yet it stated a cause of action as to the penal part of the statute and authorized a recovery of $2000 allowed therefor. But the demurrer asserted that no cause of action whatever was alleged, hence the court would have erred in sustaining it. Ib.

8. **Pecuniary Loss.** Where the suit under the death statute is by a husband, wife, or minor child, or by parents for the death of a minor, the law will perhaps imply pecuniary loss arising from that relation; but where the death is that of an adult, upon whom the

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NEGLIGENCE—Continued.

law imposes no duty of a pecuniary nature toward the persons for whom the suit is brought, facts should be pleaded showing that a pecuniary loss has been sustained, otherwise a case for damages on account of pecuniary loss is not stated. Cooley v. Dunham, 399.

9. In a suit by an administrator under the fourth clause of the death statute, if the petition does not plead facts showing that the beneficiaries for whom the suit is brought have suffered a pecuniary loss, no recovery can he had for anything more than the penalty allowed by the statute. Ib.

10. **Joint Wrongdoers: Release of One: Covenant not to Sue.** A release of one of several joint *tort feasors* discharges all; but a covenant not to sue one of several will not discharge the others. McKim v. Met. St. Ry. Co., 544.

11. **Written Contracts: Parol Evidence: Parties: Strangers.** Though neither party can have parol evidence to vary the terms of a written contract, this rule does not apply to strangers or third parties. Ib.

12. **Stranger Litigant: Parol Evidence: Both Parties.** If a stranger to a written contract litigating with one of the parties to such contract, he may have parol evidence to show that it does not express the real agreement; and in such case the other litigant, though a party to the contract, may also have such evidence. Ib.

13. **Mistake of Law: Contract: Reform.** Though ordinarily there is no relief against a mistake of law, yet if by mutual mistake as to the legal effect of a written contract, it does not express the terms of the contract, it may be reformed so as to make it conform to the real contract made. Ib.

NET VALUE. See **Life Insurance, 21.**

NOTICE. See **Mechanic's Liens, 5.**

OFFICERS. See **Bonds, 6.**

OPINION EVIDENCE. See **Life Insurance, 16.**

ORDINANCES. See **Taxes, 3, 4.**

OWNERSHIP. See **Fire Insurance, 1, 2, 3, 4, 5, 6, 7; Insurance, 6.**

PAYMENT. See **Executions, 3.**

PAYMENT BY ONE DEBTOR. See **Creditor's Bill, 2.**

PAYMENT IN COURT. See **Equity, 4.**

PARTIALITY. See **Equity, 2.**

PAROL EVIDENCE. See **Negligence, 11, 12.**

PASSENGERS. See **Negligence, 6.**

PERFORMANCE. See **Contracts, 11.**

PLEADING. See **Bills and Notes, 10; Carriers, 11; Fire Insurance, 10; Master and Servant, 22; Negligence, 5; Railroads, 10; Telegraphs and Telephones, 10, 11, 12.**

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PLEADING—Continued.

1. **Sufficiency of Petition: Manner of Questioning.** Defects in a petition are not ordinarily reached by a motion for a new trial, but are reached either by an objection to the introduction of any evidence, by demurrer, or motion in arrest, and, failing these, may be reached and raised, in some cases, even for the first time, in the appellate court. Van Zandt v. Wholesale Grocer Co., 640.

2. **Corporations: Promotion Work: Assumption of Liability by Corporation Sufficiency of Petition.** A petition in *quantum meruit* alleged that defendant corporation was a domestic corporation engaged in the wholesale grocery business; that, prior to its organization, the individual defendants were seeking to organize, among retail grocers, a corporation to engage in the wholesale grocery grocery business on the co-operative plan; that, at their special request, plaintiff undertook to organize and promote defendant corporation among retail grocers, and to explain the plan to them and to secure their patronage and subscriptions to its stock, and that he attended to its preliminary organization, so that it was incorporated and that it thereafter engaged in the wholesale grocery business, the individual defendant being its officers; that defendant corporation approved and accepted plaintiff's services and assumed liability therefor, and promised to pay him the reasonable value of his services and expenses, which is $10,000, but that defendants now refuse to pay plaintiff that sum, or any part thereof, except $1700 heretofore paid to him by them. *Held*, that the petition states a cause of action. Ib.

3. **Instructions.** In such case the court instructed the jury, at the instance of plaintiff, that if they found there was an implied promise by promoters, by acceptance of the services of plaintiff in the organization of the corporation, and if they found that the corporation, accepted the organization and promotion work and service in its behalf and that plaintiff continued soliciting subscriptions to its stock and completed its organization, defendants were liable for the reasonable value of such services, not exceeding 10,000, and his expenses, deducting therefrom $1700 already paid him. *Held*, that, in view of the fact that the evidence was conflicting as to what the $1700 was paid for, plaintiff claiming that it was a payment on account, while the evidence for defendants tended to show that it was paid as commission on the sales of stock made by plaintiff and as full payment for his services, the instruction was erroneous, as assuming that plaintiff's version of the transaction was correct. *Held, further*, that the instruction was erroneous for allowing a recovery for expenses incurred by plaintiff, in the absence of any evidence tending to prove the amount of such expenses. *Held, further*, that, in view of the fact that the instruction purported to cover the whole case, it was erroneous, as entirely omitting any reference to the defenses pleaded and in evidence. Ib.

4. **Instructions: Assuming Controverted Facts.** An instruction which assumes a controverted fact to be true is erroneous. Ib.

5. **Submitting Theory not Proved.** An instruction which submits facts that are not proved in erroneous. Ib.

6. **Failure to Submit Defenses.** An instruction for plaintiff which purports to cover the whole case is erroneous, if it omits any reference to the defenses pleaded and in evidence. Ib.

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PLEADING—Continued.

7. **Evidence: Burden of Proof.** A party having the *onus* must produce substantial evidence tending to establish his claim, in order to warrant a submission of the case to the jury; and the duty to establish the same by a preponderance of the evidence also rests upon him, the degree of preponderance, however, being immaterial. Van Zandt v. Wholesale Grocer Co., 640.

8. **Corporations: Promotion Work: Authority of Promoters.** In an action on a *quantum meruit* against a corporation, for services in promoting and organizing the corporation and selling its stock, *held*, that the parties with whom plaintiff claimed to have made his original contract for services, who were holding themselves out as officers of the corporation before it was organized, were no more the corporation than was plaintiff himself, but they were all mere promoters. Ib.

9. **Liability of Corporation.** As a general rule, a corporation is not liable for services rendered by a promoter, though there are cases holding that the promoter may recover for such services, where it appears that he expected to be compensated therefor, that the services were rendered at the request of, or under contract with, the associate promoters, or a majority of them, and where the acts done were necessary to the organization and its objects and the corporation received and enjoyed the benefits. Ib.

10. **Quantum Meruit: Necessity of Proving Value of Services.** In an action on a *quantum meruit*, a recovery cannot be had unless plaintiff proves the reasonable value of the services sued for. Ib.

11. **Corporations: Promotion Work: Implied Acceptance.** A corporation does not, by the mere act of becoming a corporate body, accept the benefit of a promoter's service in obtaining subscriptions to its capital stock. Ib.

12. **Assumption of Liability.** In an action on a *quantum meruit* against a corporation, for services in promoting and organizing the corporation and selling its stock, *held*, that plaintiff failed to prove the value of his services; that the promoters, who are alleged to have employed plaintiff, were not a majority of the promoters; that the testimony adduced by plaintiff was entirely too indefinite to constitute substantial testimony to the effect that such parties availed themselves of plaintiff's services with any sort of understanding that he was to receive compensation from the corporation, when organized; and that, after the corporation was organized, its directors refused to recognize or affirm plaintiff's claim; and hence it is *held* that plaintiff's evidence was insufficient to warrant submission of the case to the jury. Ib.

PREMISES. See **Fire Insurance, 11.**

PROBABLE CAUSE. See **False Imprisonment, 2.**

PRESUMPTIONS. See **Telegraphs and Telephones, 18.**

PRIVILEGE. See **Life Insurance, 4.**

PROMOTORS. See **Corporations, 5, 7, 8.**

PROTEST. See **Bills and Notes, 22, 23, 24, 25, 26.**

PRIVILEGED COMMUNICATION. See **Life Insurance, 6, 7.**

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PRINCIPAL AND SURETY. See **Bills and Notes, 37, 39, 41, 42.**

1. **Failure to Notify Surety of Principal's Dishonesty: Release of Surety.** As to surety bonds which are silent on the subject of notice, failure to notify the surety of any dishonest conduct on the part of the principal coming to the knowledge of the obligee will release the surety as to all losses suffered subsequent to the obtaining of such knowledge. Hartford Fire Ins. Co. v. Casey, 291.

2. **Notice of Lack of Diligence: Release of Surety.** But the obligee's knowledge of mere negligent inattention to business, failure to attend to it promptly, a want of diligence or something of that kind, not amounting to a lack of integrity on the part of a bonded agent, will not require notice thereof to be given the surety by the obligee, unless the surety, by inquiry, creates such obligation. Ib.

3. **Waiver of Notice: Release of Surety.** Even though the obligee in the bond of a fire insurance agent had knowledge that the agent had converted balances to his own use and was therefore dishonest to the extent of using money not his own although he afterwards paid up, still, plaintiff's failure to notify surety did not release the surety where the bond contained an express agreement on the part of the surety obviating the necessity of notice, the surety making no inquiry and the obligee being guilty of no concealment, although the waiver clause would not authorize the obligee to set back and intentionally invite an agent, known to be a thief and known to be stealing, to continue on and steal more. Ib.

4. **Alteration of Agency Contract: Discharge of Surety.** Where the changes made in the dealings between the agent and his company were mere changes in the method of doing business and in the rules governing same, and were not changes of the contract of agency or of the contract of suretyship, and did not increase the surety's risk, they did not have the effect of releasing the surety. Ib.

5. **Amount of Liability on Surety Bond: Attorney Fee.** The obligee cannot recover more than the penalty of the bond and where it contains a stipulation for an attorney's fee, this means that the fee shall be considered as a part of the damages within the amount of the bond and not that the fee may be collected in addition to the amount of said bond. Ib.

6. **Termination of Agency: Discharge of Surety.** After a fire insurance agent got behind with his remittances to the company, the latter suspended his authority to write new risks until he should make full payment, but his authority to perform many other agency duties was not disturbed and he continued to perform them and to remit from time to time until his balance due had been fully paid up when he resumed the writing of risks. During the few days he wrote no new policies he continued in charge of the office and was the company's agent. *Held*, that the trial court sitting as a jury was justified in holding that there was not termination of the agency relation nor creation of a new contract in relation thereto, and that the surety could not rightly claim to be discharged on that account. Nor does the fact that the company notified the agent not to write new insurance as the company was preparing to suspend operations in the State, constitute a disruption of the agency relationship, where the company did not in fact suspend and the principal and agent never contemplated that the agency was terminated. Ib.

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PRINCIPAL AND SURETY—Continued.

7. **Release of One: Contribution.** There were two sureties on the bond of an insolvent principal. A judgment was rendered on the bond against all three for $2321. Afterwards one of the sureties settled his part of the obligation with the creditor for $500 and received a release which provided that his co-surety should not be discharged. About seven years afterwards this co-surety settled with the creditor for $1500, which including interest, was less than half the original demand. The latter surety then instituted an action against the former for contribution, on the ground that of the two payments to the creditor he had paid the greater part. It was *held* that, having paid less than half of the original demand, he was not entitled to contribution. Singleton v. Shepard, 505.

8. **Contribution: Sureties: Proportionate Part.** Where there are several sureties each, as between themselves, owes his proportionate part, and one has no right to contribution from the others unless he has paid more than his proportionate part. Ib.

9. **Payment of Less Than Proportionate Part.** If one of several sureties settles the whole debt with the creditor though for a sum which is less than his proportionate part, so that no claim is left against the other sureties, he may have contribution from his co-sureties for their part of the sum he actually paid to the creditor in extinguishment of the debt against all of them. Ib.

10. **Statutes.** The Statute on Sureties examined and authorities discussed. Ib.

PRIVITY OF TITLE. See **Equity, 5.**

PROXIMATE CAUSE. See **Telegraphs and Telephones, 1, 2.**

PRIVATE PROPERTY. See **Taxes, 8.**

PRINCIPAL AND AGENT. See **Mutual Beneficiary Societies, 2.**

PROMOTION WORK. See **Pleading, 2, 8, 9, 11.**

PROPERTY—TRANSFER. See **Mechanic's Liens, 5.**

PUBLIC SERVICE CORPORATIONS.

1. **Gas Company: Duty to Extend Mains.** A public service corporation engaged in supplying gas to the people of a city by means of pipes lines laid in the street under a franchise is not under the absolute or unconditional duty of extending its mains to new territory whenever requested, without regard to the reasonableness of the demand, in the absence of anything in the nature of a special contract or obligation on its part requiring it to do so. Investment Co. v. St. Joseph Gas Co., 371.

2. **Reasonableness of Demands for Extensions.** The reasonableness of a demand upon a public service corporation, like a gas company, to extend its mains to other uncovered portions of the city is a question for the courts to determine, depending upon the expense involved, the number of customers likely to be served and the probable revenue to be derived from the extension as compared with the necessary preliminary outlay and the likelihood of the company receiving a reasonable return thereon. Ib.

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PUBLIC SERVICE CORPORATIONS—Continued.

3. **Contract with Customer for Extension of Main: Validity: Action to Recover Money Paid upon Completed Contract for Extension.** A gas company had a rule not to make an extension unless those desiring it would first advance the cost thereof and receive in payment the amount paid for gas within a certain limited time. Under this rule plaintiff contracted for an extension to certain undeveloped territory and after performance of the contract sued for the money expended in building the extension on the ground that said contract was void, said rule having been deemed by the Public Utilities Commission to be unjust and discriminatory. *Held*, that as the duty of the public service corporation to extend its mains was not absolute or unconditional, the contract was not void in the absence of facts showing that the company was bound to extend its mains on request, and the contract having been performed and the money paid on the strength of it, the money could not be recovered. The fact that the Public Utilities Commission has decided that a universal rule of the character indicated is void, does not affect the question of whether the particular contract in question made under that rule was void and without consideration. Ib.

PUNITIVE DAMAGES. See **Master and Servant, 19, 20.**

PUBLICATION. See **Libel and Slander, 1.**

PURCHASE. See **Bills and Notes, 15, 16.**

PUBLIC POLICY. See **Bonds, 1, 3, 4.**

QUASH. See **Executions, 1, 2.**

QUANTUM MERUIT. See **Pleading, 10.**

RAILROADS.

1. **Track a Constant Warning: Duty of One Crossing.** A railroad track is itself a warning of danger and though an approaching train fail to give other warnings required by positive law or by the facts of the particular case, yet one who without listening or looking, heedlessly attempts to cross such track in front of such negligently operated train, when to look or listen would make known the peril in time to avoid injury, is himself guilty of negligence as a matter of law, contributing to his own injury, and cannot recover damages. McQuitty v. K. C. Southern Ry. Co., 450.

2. **Care in Crossing: Right to Rely on Warning Signals.** One about to cross a railroad track is not required to use extraordinary care to look and listen for approaching trains and the right to rely on a compliance with the requirements that approaching trains give due warning by bell or whistle is an important factor in determining whether such traveler is guilty of negligence as a matter of law. Ib.

3. **Exception to General Rule Arising from Use of Particular Tracks.** The rule that railroad tracks are signals of danger requiring those about to cross to look and listen for trains approaching, applies only to tracks which are likely to be used at any particular time. Side-tracks and switches may be so restricted in their use as to make it a question for the jury to say whether one about to cross such track had reason to anticipate that a train might be running thereon. Ib.

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RAILROADS—Continued.

4. **Due Care: Presumption: Action for Death.** Action for death of one whose duties required him to cross and recross many times a spur of defendant railway for which deceased was working. Deceased was crushed by a freight car which was standing on the spur track when such car was bumped by an engine without warning. There was no evidence that deceased did not listen attentively for an approaching engine and in the absence of such evidence the presumption of due care in this respect attended the deceased. McQuitty v. K. C. Southern Ry. Co., 450.

5. **Death: Due Care: Evidence.** Action for death of employee whose duties required him to cross and recross defendant's spur track many times, such track being used only on rare occasions. Conditions and circumstances examined and deceased considered not negligent in failing to look and listen under circumstances where the presence of defendant's engine could not reasonably have been anticipated. Ib.

6. **Crossings: Signals: Statutory and Otherwise: Effect.** Where a railroad maintains a danger signal at a crossing, whether required by statute or not, the fact that the signal is absent is an invitation to cross and an assurance that the track can be crossed safely. But a traveler is not excused thereby from himself exercising care to avoid a collision. And absence of a danger signal does not excuse a traveler from failure to exercise care whether or not there has usually been a danger signal at a crossing. Swigart v. Lusk, 471.

7. Where a railroad is guilty of negligence in failure to give statutory warning on approaching a crossing which results in injury to a traveler, the question of a failure to ring a gong customarily rung at such crossing being a ground of its negligence is not material and bears on the question of the traveler's contributory negligence only. Ib.

8. **Negligence: Negligence Per Se: Established Custom or Ordinance or Statute Violated.** The breach of an established custom as well as an ordinance or statutory regulation or requirement as to signals at crossings is negligence *per se on* the part of the one committing the breach and the knowledge of such custom or ordinance or reliance on same became important only when such custom or ordinance is invoked to excuse the conduct otherwise negligent of a traveler seeking to recover for such negligence. Ib.

9. **Viewpoint of Determining.** Negligence, contributory or otherwise, is determined from the viewpoint of the actor. Ib.

10. **Pleading: Negligence: What Sufficient.** In pleading it is generally sufficient to plead the duty imposed by law or custom and its breach with resultant injury. Ib.

11. **Contributory Negligence: Contributory Negligence Is a Defence.** While a plaintiff may anticipate the defense of contributory negligence and placed the facts which rebut or excuse same, where negligence, contributory or otherwise is charged it is generally sufficient for the other party to deny same. One may prove without pleading the particular facts which rebut or excuse negligence. Ib.

12. **Crossing Injuries: Failure to Give Statutory Signals.** Action by one who was driving an automobile and who was injured by collision

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RAILROADS—Continued.

with a train of defendant at a street railroad crossing. The pleading and proof of plaintiff showed that defendant failed to give the signals required by statute of train's approach and that the injury occurred as a result thereof. This entitled plaintiff to recover unless the evidence showed contributory negligence on his part so clearly that reasonable minds could draw no other reasonable conclusion. Ib.

13. **Appellate Practice: Reviewing Demurrer to Evidence: Facts Considered as True.** Where a demurrer to plaintiff's evidence was sustained by the trial court, the appellate court in reviewing such action will consider as true the facts testified to by the plaintiff, unless such facts are impossible or contrary to physicial facts. Ib.

14. **Crossing Collision: Review of Evidence.** Action by an automobile driver against a railroad for injuries occasioned by collision with a train at defendant's crossing. Conditions considered and evidence reviewed. Evidence deemed sufficient to warrant jury in finding that plaintiff exercised ordinary care in looking and listening for the train and that he used ordinary care to avert the threatened danger after its discovery. Ib.

15. **Negligence: Avoiding Danger: Impractical Thing Not Required.** One acting under the excitement of impending danger is not required, by the law, to do at his peril the thing which afterwards appears to have been the safest. Especially is this so where defendant has, by its neglect of duty and failure to give timely warning, lulled plaintiff into a feeling of security and brought him into peril. Ib.

16. **Crossing Tracks: Rule Concerning.** It is always a person's duty to look and listen when possible before entering on a railroad crossing. Stopping is necessary when it is essential to make looking and listening effectual. Ib.

17. **What Acts Not Negligent as Matter of Law.** Action against railroad on account of injuries occasioned by a collision between plaintiff's automobile and defendant's train at city street crossing. The evidence showed that plaintiff approached the crossing attentively listening for the signals of approaching trains required by statute and for the ringing of the gong maintained by defendant at such crossing but did not hear any signals. His act in approaching the crossing at six or eight miles per hour cannot be declared negligence as a matter law. Ib.

18. **Crossing: Looking, Listening: Slowing Down and Stopping.** A traveler approaching a railroad crossing is required to look or listen or both, when practicable, for an approaching train. He is also required to slow down or stop when necessary to make looking or listening effectual. Ib.

RATES. See Carriers, 9; Damages, 4.

RELEASES.

1. **Rescission: Statute.** Although section 1812, R. S. 1909, providing that when a release is pleaded in bar, the reply may allege facts showing fraud, etc., in its procurement, has changed the prior rule that a release could be set aside only in equity, nevertheless it was not intended to thereby change the rules governing the rescission of contracts of settlement, for fraud. Wessel v. Waltke & Co., 582.

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RELEASE—Continued.

2. **Necessity of Tender: Pleading.** Where a release, pleaded as a defense in an action at law for personal injuries, is attacked by the reply for mistake and false representations pursuant to Sec. 1812, R. S. 1909, plaintiff is bound to aver in the reply, and to prove, a tender, before suit brought, of the amount received and interest, or, in lieu thereof, to plead and prove facts showing that the amount would not have been accepted if tendered, and, therefore, that the tender would have been a useless act. Wessel v. Waltke & Co., 582.

3. **Waiver of Tender.** In an action for personal injuries, where plaintiff sought to avoid a release pleaded in the answer, the fact that defendant insisted on the conclusiveness of the settlement and release was not, of itself, evidence upon which to base a claim that a tender of the consideration, before suit was brought, would have been refused and, therefore, that it was unnecessary to make the tender. Ib.

REPLEVIN.

1. **Justices of the Peace: Jurisdiction.** In a replevin suit where a justice of the peace finds that both plaintiff and defendant have an indefinite interest in the subject-matter, he has no jurisdiction under the statutes to certify it to circuit court as an equitable matter for settlement. And this action by the Justice does not confer jurisdiction of the subject-matter on the circuit court even though the parties appear in the latter court and try the case without objection. Britt v. Summers, 410.

2. **Agister's Lien: Instructions.** The plaintiff loaned one Armstrong a sum of money to settle two attachment suits, and took a mortgage on the horse which is the subject of this litigation. When the attachment suits were brought, the constable took charge of the horse under the writs and boarded the horse at the defendant's barn. After Armstrong settled the attachment suits and gave the mortgage on the horse, he made arrangments with the defendant Carr, to board the horse. This was done several hours after the mortgage was executed. When the mortgage fell due the plaintiff demanded his horse or the money from Armstrong, and he was informed that the horse was located at Carr's barn. Carr refused to deliver up the horse claiming an agister's lien and the plaintiff instituted this suit in replevin against him. The issues were determined in favor of the plaintiff. *Held*, that an instruction given to the jury that while the horse was in the custody of the constable no lien accrued to the defendant for the keep of said horse during said time, was erroneous. Bermingham v. Carr, 411.

3. The lien of a mortgagee is superior to any agister's lien, if such lien is created prior to the placing of the horse with the agister and if the holder of the mortgage has in no way waived his right to priority. Ib.

4. An agister who takes care of a horse under a contract with a bailee of the horse, and whom he knows to be in charge of the animal, as bailee, is bound to know the extent of the authority of such bailee, and he has no agister's lien as against the bailor. Ib.

5. **Constables.** It is the constable's duty under the law to take proper care of animals that are taken into his custody, and, if he does not do so he is liable, but it is not assumed that he will not place them in the custody of some one engaged in caring for like animals. Ib.

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REPLEVIN—Continued.

6. **Chattel Mortgages.** A chattel mortgagee only becomes a lien on a horse as to third parties from the date that it is filed of record, and such mortgage must be recorded within a reasonable time after its execution. Ib.

RESERVE VALUE. See **Life Insurance, 13; Insurance, 3.**

RES IPSA LOQUITUR. See **Master and Servant, 21; Negligence, 4; Telegraphs and Telephones, 13, 19, 21.**

RES GESTAE. See **Life Insurance, 17.**

RES ADJUDICATA. See **Contracts, 5, 6; Divorce, 1.**

RESCISSION. See **Breach of Promise, 2.**

REPLEVIN. See **Counterclaim, 2.**

RIGHT TO ADMINISTER. See **Executors and Administrators, 1, 2, 7.**

RIGHT OF WAY. See **Railroads, 2, 3, 12; Taxes, 9.**

RULE OF DECISION. See **Bills and Notes, 9, 11; Trial Practice, 1.**

SAFE PLACE. See **Master and Servant, 23, 28.**

SCHOOLS AND SCHOOL DISTRICTS.

Power of Board to Select Site for High School: Statute. Under the provisions of the Buford Rural High School Law (Laws 1913, p. 721) —referring to article 4, chapter 106, R. S. 1909,—a school board of a consolidated school district has power to select and acquire a site for a high school, the designation of a site by the voters being considered largely advisory. Young v. Consolidated School Dist. No. 3, 419.

SCOPE OF EMPLOYMENT. See **Master and Servant, 13.**

SCHOOLS. See **Bonds, 8.**

SERVANT—EXPERIENCED. See **Master and Servant, 4, 7.**

SETTLEMENT. See **Divorce, 4.**

SET-OFF. See **Counterclaim, 1.**

SIGNS. See **Landlord and Tenant, 2, 7.**

SLOWING DOWN. See **Railroads, 18.**

STREET RAILROADS. See **Taxes, 12; Trial Practice, 2.**

STATUTE OF LIMITATIONS. See **Executors and Administrators, 8, 9, 12.**

1. **Pleading: Demurrer.** The Statute of Limitations can be invoked by a special demurrer, where the petition, on its face, discloses that the action is barred, by the general statute, and nothing is pleading as an exception relieving against the bar. Steinbreugge v. Prudential Ins. Co., 194.

2. **Avoidance of Bar.** If the cause of action is such that the bar of the general statute may be obviated by some exception thereto, plaintiff must plead the facts that bring the case within such exception. Ib.

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STATE OF LIMITATIONS—Continued.

3. **Justices' Courts: Pleading.** Under Sec. 7412, R. S. 1909, technical rules of pleading are wholly inapplicable to a statement of a cause of action before a justice of the peace. Steinbreugge v. Prudential Ins. Co., 194.

4. **Sufficiency of Statement.** The statement of the cause of action, in a suit filed in a justice's court, is sufficient if it serves to reasonably apprise the defendant of the nature of the claim asserted against him and is sufficiently specific and definite to bar another action on the same demand. Ib.

5. **Statute of Limitations: Avoidance of Bar.** In a suit instituted in a justice's court, the statement need not, in order to state a cause of action, plead the facts showing an exception relieving against the bar of the general Statute of Limitations; and proof of such facts may be made at the trial, notwithstanding they are not pleaded as an exception in the statement. Ib.

6. **Statute of Limitations: Manner of Invoking.** If the defendant, in an action instituted in a justice's court and appealed to the circuit court, wishes to raise the point that plaintiff's statement shows his cause of action is barred by the Statute of Limitations, he must do so, either by pleading the statute relied on or by invoking the same in some appropriate manner at the trial. Ib.

7. **Justices' Courts: Appeal to Circuit Court: Rules of Practice.** Where a case is appealed from a justice's court to the circuit court, the general rules of practice in the latter court govern, but not the rules of pleading applicable to causes originating therein. Ib.

8. **Amended Statement: Manner of Determining Sufficiency.** Where an action originates before a justice of the peace and is appealed to the circuit court, the sufficiency of an amended statement filed in the latter court is to be determined by the requirements of the law applicable to statements filed in justices' courts. Ib.

STATUTES CITED AND CONSTRUED.

Revised Statutes, 1879.

Section 7146, see page 423.

Revised Statutes, 1889.

Section 7779, see page 421.
8001, see page 421.
8085, see page 421.

Revised Statutes, 1899.

Article 3, Chapter 122, see page 361.
Section 8251, see page 361.
9414, see page 280.
9415, see page 280.

Revised Statutes, 1909.

Article 2, Chapter 61, see page 37.
Article 4, Chapter 106, see page 420.

Section 14, see pages 15, 18.
15, see pages 16, 18.
50, see pages 17, 18.
82, see pages 190, 191.
191, see pages 186, 187, 188, 189, 190, 192.
195, see page 193.
277, see page 507.

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STATUTES CITED AND CONSTRUED—Continued.

965, see page 543.
1850, see page 154.
2082, see pages 154, 610.
2104, see page 571.
2976, see page 37.
3303, see page 548.
5425, see pages 400, 407, 408.
5496, see page 361.
6329, see page 427.
6898, see page 35.
6900, see pages 29, 35, 37.
6901, see page 37.
6902, see page 37.
6937, see page 172.
6946, see page 321.
7068, see page 177.
7412, see page 202.
7579, see page 135.
7584, see page 135.
7704, see page 568.
7705, see page 568.
7716, see page 568.
7717, see page 569.
7722, see page 569.
7723, see page 569.
7725, see page 569.
8217, see page 434.
8235, see page 574.
9991, see pages 90, 92.
10000, see page 431.
10001, see pages 212, 217.
10002, see page 212.
10033, see page 429.
10053, see page 427.
10059, see pages 427, 430.
10060, see page 430.
10077, see pages 430, 431.
10078, see page 429.
10088, see page 427.
10792, see page 422.
10845, see page 422.
10866, see page 422.
10869, see page 421.
10941, see page 421.
11277, see page 506.

Session Acts.

Laws of 1903, see page 321.
1905, see page 361.
1911, see page 186.
1911, see page 190.
1911, see page 193.
1911, see page 487.
1911, see page 490.
1911, see page 574.
1911, see page 664.
1913, see page 419.
1913, see page 422.
1913, see page 571.

SUBROGATION. See **Creditors Bill, 1; Executions, 4.**

SUBSTITUTION. See **Breach of Promise, 2.**

SUIT IN EQUITY. See **Taxes, 1.**

SURETIES. See **Principal and Surety, 10.**

SURETY—RELEASE. See **Principal and Surety, 1, 2, 3, 7.**

STIPULATION—PRINTED. See **Telegraphs and Telephones, 7.**

STREET IMPROVEMENTS. See **Taxes, 12, 13.**

TARIFF SHEETS. See **Carriers, 8.**

TAXES.

1. **Tax Bills: Suit in Equity to Cancel: Grading Boulevard: Authorization by the City.** The grade of Swope Parkway Boulevard in Kansas City had been fixed and established. The park board passed a resolution that a certain part of said boulevard be graded to its full width and to the established grade. The City Council then passed an ordinance authorizing the work to be done "according to plans and specifications" referred to as being then on file when there were none. If said ordinance had been the only legislative enactment of the city authorizing the work to be done there might be room for the claim that the council had author-

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TAXES—Continued.

ized something to be done the nature and extent of which was unknown as no specifications had been adopted. But, after the park board had adopted plans and specifications, and after it had prepared a form of contract, had advertised for bids and had let the tentative contract, the city, by ordinance, authorized the grading to be done as resolved by the board and in accordance with the plans and specifications on file, and also ratified the tentative contract. which made the same final and binding under Sec. 31, Art. 13 of the Charter. Hence there was legislative authorization for the grading and for its being done according to specifications, even if the first ordinance referring to plans and specifications was passed when none were on file. Albers v. Paving & Crusher Co., 265.

2. **Committing City to Improvement.** The passage of an ordinance by Kansas City authorizing the grading of a boulevard and referring to plans and specifications as being on file when there were none in existence, did not irrevocably commit the city to the improvement regardless of the cost since the whole matter was in the council's hands and could be determined when it came to consider whether it would finally authorize the work and ratify the contract made by the board. Ib.

3. **Ordinance: Effect of.** The passage of an ordinance by Kansas City authorizing the grading of a boulevard and referring to plans and specifications as being on file when there were none in existence was not an absolute nullity, but with the plat of the city engineer, was sufficient to afford a basis on which to institute proceedings in the circuit court to ascertain damages. Hence the said court was not without jurisdiction to entertain and carry on said proceeding. Ib.

4. **Ordinance: Surplusage.** Where the provisions in the charter of Kansas City, pointing out the steps necessary to be taken in grading a street, were not violated in grading a parkway, and the fact that no plans of specifications were adopted prior to the adoption of the first ordinance of the city council in relation to the work, referring to such plans and specifications as on file is not shown to have resulted in any detriment or injustice to the city, the public, or the parties involved, the mere recitation of such first ordinance that the plans and specifications were on file may the treated as surplusage. Ib.

5. **Roads and Highways: Establishment: Defects Cured by Deed from Owners.** A right of way deed signed by a large number of landowners, conveying to a county the right of way necessary to make a particular boulevard 150 feet in width, as to all lands whose owners joined therein, cured all defects in a prior proceeding to establish the highway. Ib.

6. **Dedication: Subsequent Acquisition of Title.** If deeds were sufficient to vest title to a graveyard in a land company which had dedicated streets by platting an addition, such title, though acquired subsequent to the platting of the addition, would inure to the benefit of the public by reason of the dedication by plat. Ib.

7. **Dedication of Land: Intention: Vesting of Title.** If landowners intended to and did consent to an appropriation of a strip of land for a boulevard, it was not necessary for the prescriptive term to elapse in order to vest title in the public. Ib.

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TAXES—Continued.

8. **Work on Private Property: Evidence.** In a suit to cancel tax bills on the ground that the boulevard improved was over private property, evidence *held* not to warrant cancellation and cause a company which graded the boulevard to lose payment for work done in good faith, and with no notice that there could be even a claim that grading was not on public property. Ib.

9. Where owners of land executed a right of way deed for a parkway to the county three days before they got title to the land, but more than ten years elapsed after they obtained title and neither they nor any other person holding the property at any time made any claim to the strip they sought to dedicate by joining in the right of way deed which was open to and used by the public, such conduct on their part evinced an intention to dedicate the land after they had title; and if the right of way deed was not a valid statutory dedication, it was good as a dedication at common law. Ib.

10. **Corporations: Conveyance: Want of Seal.** If a realty company a corporation has a seal and does not affix it to a deed relinquishing right of way for a boulevard, doubtless the failure to attach the seal makes the deed insufficient as a conveyance of the company's legal title. But since the dedication attempted by the company has been accepted by the public, it is valid as a common-law dedication if not good otherwise. Ib.

11. **Church Trustees: Authority: Presumption.** Church trustees, in conveying land to a county for a parkway, are presumed to have acted by authority from the church for whose benefit and under whose direction they held the property, and such trustees can property dedicate property to a public use not inconsistent with the trust as to consent to an easement on the east side of church property to create a beautiful boulevard in front of the church. Ib.

12. **Taxbills: Street Railways: Street Pavement: Abutting Property.** The property of a street railway company on which is located car barns and shops and connected with the tracks on the street by numerous switch tracks, is liable for its proportion of the entire cost of paving the street on which said property abuts, notwithstanding no paving was done on that part of the street where the switch tracks were laid to connect the railway in the street with the car barn and shop, the street railway having paved that part under the requirements of its franchise, the opposite side of the street, however, being paved under a public improvement ordinance covering several blocks and for the payment of which tax bills sued upon herein were issued. Municipal Securities Corp. v. Met. St. Ry. Co., 518.

13. **Franchise: Street Paving.** Where a street railway has, under the requirements of its franchise, paved a street, in front of premises owned by it, abutting on said street, it is not relieved of liability for its share of the cost of paving the entire street, notwithstanding the contractor to whom the tax bills were issued did no paving in front of the property of the street railway except on the opposite side of said street. Ib.

14. **Charter of Kansas City.** The Charter of Kansas City does not recognize any longitudinal line dividing a street and making the property on one side of the street bear the burden of paving up to such a line, and the property on the other side bear a like burden upon its side. All property is benefited alike in an im-

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TAXES—Continued.

proved district and all should bear proportionately the cost of the improvement. Municipal Securities Corp. v. Met. St. Ry. Co., 518.

15. **Abutting Property: Proportionate Cost.** Because the amount of paving done in front of some of the property abutting on a street is less than in front of other property does not relieve it of the burden of its proportionate amount of the cost of the entire work. Ib.

TELEGRAM—FACE. See **Telegraphs and Telephones, 1.**

TELEGRAM. See **Damages, 2, 5.**

TELEGRAPHS AND TELEPHONES. See **Master and Servant, 15, 16, 17.**

1. **Delay: Proximate Cause: Knowledge: Face of Telegram.** A telegram was addressed to the sendee as an attorney in which it was stated that two law suits would be heard "at Ottumwa next Thursday" stating the nature of the suits and that "Counsel will have preliminary conference at Ottumwa Wednesday." The sendee had been employed as an attorney in the cases. Delivery of the message was delayed for ten days and he in consequence did not go to Ottumwa and lost his fee. It was *held* that the delay in delivery was the proximate cause of loss of the fee; and that the face of the telegram sufficiently showed the probable result of a failure to deliver. Jacobs v. Western Union Tel. Co., 300.

2. **Contract: Breach: Damages: Proximate Cause.** Where according to the usual course of things, a certain result will follow the breach of a contract, or a duty founded on contract, the damage from such result is not remote and the breach is the proximate cause of the damage. Ib.

3. **Interstate Commerce: Federal Decisions.** A telegram to be sent from one State to another is interstate commerce and Federal laws and decisions are of controlling influence in disposing of litigation arising thereon. Ib.

4. **Limitations of Liability on Back of Message: Repeated Message.** Printed stipulations on the back of a telegram blank limiting liability for delay mistransmission and misdelivery, of the message written thereon unless repeated, are valid. But the provision as to repeating the message will not apply where the message has been correctly transmitted, the fault being merely in neglect to deliver. Ib.

5. **Stipulation: Limit to Cost of Message: Invalidity: Negligence.** A stipulation that a telegraph company will only be liable for delay in delivery for the sum paid to it for transmitting the message unless it is repeated, is not a stipulation limiting liability; but is, really, a stipulation against *any* liability for the negligence of such company, and the right to make such stipulation should not be allowed. Ib.

6. **Valued Message.** The printed stipulation on the back of a telegram that the message is valued at fifty dollars and limiting all liability to that sum is valid. Ib.

7. **Printed Stipulation: Action by Sendee.** The printed stipulations on the back of a telegram limiting the liability of the company may

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TELEGRAPHS AND TELEPHONES—Continued.

be invoked by the company in an action brought against it by the sendee. Ib.

8. **Interstate Commerce Commission: Rates: Presumption.** It will be presumed, in the absence of a showing to the contrary, that a telegraph company has filed with the interstate commerce commission a copy of its rates, limitations, exemptions, and schedules. Ib.

9. **Care Required of Company Maintaining.** A telephone company is required to use the highest degree of care practical in making and keeping safe the use of its telephone apparatus but it is not an insurer. Warren v. Missouri and Kansas Telephone Co., 549.

10. **Pleading: Sufficiency of Petition: Test.** A petition is not always to be judged by the strict rules of logic or absolute accuracy in its statements, but rather by whether it fairly informs the defendant of the issues to be tried. Ib.

11. **Petition: Sufficiency of: Not Same Test as for Instruction.** An instruction imposing on defendant the duty of keeping its telephone equipment safe, instead of using the highest degree of care to that end would be erroneous, but a petition will not be held fatally defective on that account, especially after verdict. Ib.

12. **Surplusage in Petition: Immateriality.** Where a statement in a petition is merely a statement of law, it may be regarded as surplusage and hence its accuracy is not material. Ib.

13. **Injury from Shock: Res Ipsa Loquitur.** Where plaintiff answering a telephone call was injured by a shock when she took hold of the transmitter and receiver, the occurence was so unusual and contrary to what might be expected under such circumstances as to show that there was something wrong with the instrumentalities solely under the control of the defendant telephone company and the doctrine of *res ipsa loquitur* would apply. Ib.

14. **Personal Injuries: Destructive Agencies: Care Required in Guarding.** Because storms and floods and lightning are destructive it is necessary to use the highest degree of care and skill to guard against them in the use of instrumentalities made dangerous thereby. Ib.

15. **Electricity: Injuries from: Judicial Notice.** The courts take notice that static electricity or lightning is likely to get on and pass over wires carrying manufactured electricity. Ib.

16. **Duty of Electric Company to Safeguard Against Lightning.** An electrical company whose wires enter a building is bound to anticipate that unless devices are installed to prevent, lightning may follow its wires into the building and result in personal injuries. Ib.

17. **Duty of Electric Company to Safeguard Against Lightning.** If lightning is conducted to or into a building through the negligence of the owner of the wires entering such building failing to use preventive devices, the owner may be liable; though the lightning may be considered an act of God the carrying of it into the building by wires may be considered an act of the owner of such wires. Ib.

18. **Presumption in Case of Injuries.** The dangerous character of electricity is generally known but the means by which it is mini-

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TELEGRAPHS AND TELEPHONES—Continued.

mized are known only to those who have special knowledge and skill. Those who engage in the business of serving the public with telephones must be held to possess and employ, the requisite knowledge to protect its patrons so far as practicable from dangers incident to the business. And this is true whether such dangers arise from the currents employed by them or such as may be reasonably expected to get on the wires from other sources. Warren v. Missouri and Kansas Tel. Co., 549.

19. **Personal Injuries: Negligence: Accident Extraordinary: Res Ipsa Loquitur.** In case of personal injuries where the thing causing such injury is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, the doctrine of *res ipsa loquitur* applies. Ib.

20. **Injury from Shock: Negligence: Jury Question.** Whether or not a telephone company discharged the burden of proving lack of negligence causing injuries to one who was using a telephone operated by defendant company was a question for the jury. Ib.

21. **Negligence: Res Ipsa Loquitur: Burden of Proof.** Action against a telephone company on account of personal injuries occasioned by a shock received while properly using a telephone installed by defendant company. The burden of proving that the presence of excessive electricity which caused the injury was not due to negligence of the company in failing to use the highest degree of care practical rested on such company. Ib.

TENDER. See **Release, 2, 3.**

TOOLS. See **Master and Servant, 30, 31, 32, 33.**

TORTFEASORS—JOINT. See **Master and Servant, 14.**

TORTFEASORS—RELEASE. See **Negligence, 10.**

TRIAL. See **Executors and Administrators, 10; Fire Insurance, 11.**

TRIAL PRACTICE.

1. **Demurrer to Evidence: Rules of Decision.** In passing upon a demurrer to the evidence, the court must consider the evidence introduced by plaintiff as true, and draw therefrom every reasonable inference in his favor, warranted by law. Irwin v. United Railways Co., 666.

2. **Street Railways: Collision with Wagon: Contributory Negligence.** In an action by the driver of a wagon for injuries sustained in a collision between the wagon and a street car, plaintiff testified that, when he started to drive across the track, the wagon was traveling at the rate of three or four miles per hour; that at that time, he looked and saw the car, two hundred and fifty feet distant; that it was at such an acute angle from him as to make it difficult for him to accurately estimate its speed, but he thought he had ample time to cross the track in safety; and that, after the wagon had moved a distance of twenty-five or thirty feet from the time he first observed the car, the car collided with the rim of one of the rear wheels of the wagon. *Held*, that, although plaintiff did not look at the approaching car, after he first saw it, he was not guilty of contributory negligence as a matter of law, since, not being able to accurately determine the speed of the car,

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TRIAL PRACTICE—Continued.

his error in thinking he had ample time to cross the track in safety was merely an error of judgment. Ib.

3. **Common-Law Speed.** In an action by the driver of a wagon for injuries sustained in a collision between the wagon and a street car, evidence that, when plaintiff started to drive across the track, the car was two hundred fifty feet away; that the wagon was traveling at the rate of three or four miles per hour, and traveled twenty-five or thirty feet before the car struck the rim of one of the rear wheels, *held* to warrant a finding that the car was running at the rate of thirty or more miles per hour, and that, under all the circumstances, irrespective of the speed ordinance, such speed was excessive, and that a causal connection between such excessive speed and the collision existed. Ib.

TRUSTEES—CHURCH. See **Taxes, 11.**

TWO OFFENSES. See **Intoxicating Liquor, 1.**

UNLAWFUL DETAINER.

1. **Justice Courts: Appeal: Jurisdiction.** In an unlawful detainer suit the justice court has exclusive original jurisdiction and unless an appeal therefrom is applied for within the time allowed by statute, no jurisdiction over that case is acquired by the circuit court. Nor, in such case, will the appearance in the circuit court of the opposite party confer jurisdiction. Karicofe v. Schwaner, 565.

2. **Evidence: Term of Court: Judicial Notice.** If the judgment of the justice in an unlawful detainer suit be rendered during the term of the circuit court, the appeal is returnable within six days after rendition of judgment; and no appeal can be allowed unless the same be applied for and an affidavit and recognizance filed with the justice before the return day of the appeal. If the judgment of the justice be rendered during the vacation of the circuit court the first day of the next term is the return day. The court of appeals can take judicial notice of the beginning of a term of the circuit court but not of the end. Ib.

3. **Judgment: Collateral Attack.** Where the power of the circuit court to pass upon a particular case rests solely upon a matter *in pais*, its judgment is not open to collateral attack but is valid until it is reversed by appeal or writ of error or is annulled by other direct attack. The action at bar being a suit to set aside a judgment of the circuit court rendered at a former term, cannot be sustained on the ground that the appeal from the justice was not taken in time, as the circuit court tried the case as if a fact existed which made the appeal properly and timely taken, and there is nothing on the face of the record to show to the contrary. In such case it will be presumed that the court found that such fact or matter *in pais* existed. If the court erred in such finding, the remedy to correct that error is the same as when other erroneous decisions are made. Ib.

4. **Judgment: Petition for Review: Verification.** An action in the circuit court to set aside a judgment rendered at a former term cannot be treated as a petition for review as the petition was not verified. Ib.

5. **Vacation: Coram Nobis.** A writ of error *coram nobis* is to bring the court's attention to, and obtain relief from, an error as to a fact which, without negligence of the one asking for the writ, was

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UNLAWFUL DETAINER—Continued.

not shown and established at the time of the trial, and will not lie to correct an error of fact he knew or should have known; and so will not lie at instance of one who took appeal from a justice to the circuit court where judgment was rendered against him, to vacate such judgment on the ground that by reason of an extraneous fact the appeal was not in time. Karicofe v. Schwaner, 565.

6. **Appeal and Error: Review.** While a writ of error *coram nobis* will lie to open up a judgment on the ground that it was rendered against a minor, yet as the question of whether the defendant was a minor was presented and evidence *pro* and *con* heard thereon, and no findings of fact or declarations of law were asked or given, the judgment of the trial court, in the absence of any showing to the contrary, is presumed to be based on the fact that the trial court in this action found that appellant was not a minor at the time the judgment was rendered. Ib.

VALUE. See **Life Insurance, 13, 21.**

VARIATION. See **Guaranty, 2.**

VACATION—JUDGMENT. See **Judgments, 2, 4.**

VEXATION—PENALTY. See **Life Insurance, 8.**

VERDICT. See **Breach of Contract, 5; Breach of Promise, 5.**

WALLS. See **Landlord and Tenant, 1.**

WAIVER. See **Executors and Administrators, 6; Fire Insurance, 8; Insurance, 10; Life Insurance, 4; Mutual Benefit Insurance Societies, 4, 6, 7; Releases, 3.**

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Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—Hearing of Causes. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—Taking Records from Clerk's Office. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—Diminution of Records. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of *certiorari* to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—Notices of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Review of Instructions on General Statement of Evidence. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that "evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court. If the opposite party shall

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contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—Evidence—Bill of Exceptions to be Allowed, When. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—Exceptions—Questions to be Embodied in Bill. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—Duty of Circuit Court Clerks in Making Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the* ——— *day of* ———, 188—, *executed on the* ——— *day of* ———, 188—;" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—Bill of Exceptions in Equity Cases. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—Abstract and Briefs to be Filed and Served. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions

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presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—Citing Authorities in Briefs. In ompliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side-paging shall be set forth. The respondent, in his statement, may adopt that of appellant; or, if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

RULE 17.—Appellant's Brief to Allege Errors Complained of. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—Penalty for Failure to Comply with Rule 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

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RULE 19.—Agreed Statement of the Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—Motion for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—Motion for Affirmance. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

RULE 22.—Extending Time for Filing Statement, Abstracts, Etc. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

RULE 23.—Oral Arguments. When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him, and will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will thereupon make his statement and answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and in such cases the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

RULE 24.—Notice on Motion to Dismiss or Affirm. A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

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RULE 25.—When Appeal is Returnable—Certificate of Judgment—Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

RULE 26.—Record Entries Perfecting Appeal not to Be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then, absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be true, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

(Adopted, January 6, 1913.)

RULE 27. The defacement of books in the library by marking the margin of pages, or by drawing lines underneath printed matter, or by turning down the corners of leaves, is prohibited.

RULE 28. An abstract of the record is a court paper not for the exclusive benefit of either party; therefore, in printing such abstract the parties are forbidden to italicize any part of it, except where the record from which the abstract is taken is in italics. If italics are desired, they may be used in the statement, brief and written argument.

RULE 29. Where an original instruction is modified by the trial court, it is not necessary to print them separately in the abtract. The instruction, as modified, should be printed with the words of modification printed in italics, or between brackets, that the court may readily observe the point of difference.

RULE 30. Where there are several exhibits in the cause, they should be identified in the index to the abstract more definitely than by a mere number, or letter.

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Rules of Practice in the St. Louis Court of Appeals.

REVISED JULY 20, 1909.

TO BE IN FORCE AUGUST 15, 1909.

Rule 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court Room.

Rule 2.—Words Appellant and Respondent, What They Include. Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

Rule 3.—Motions. All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

Rule 4.—Hearing of Causes. Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

Rule 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

Rule 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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Rule 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions: but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Rule 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions: provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

Rule 10.—Duty of the Clerk in Making Up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the ——— day of ——— 190—, executed on the ——— day of ———, 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstract above referred to and of any

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objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

Rule 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

Rule 14.—Abstracts—When Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2048, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for

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the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

Rule 17.—Costs, When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

Rule 18.—Briefs, What to Contain and When Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Rule 19.—Citing Authorities in Brief. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

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Authorities incorrectly cited as to book, page or title of case, will be disregarded.

Rule 20.—Extension of Time. Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

Rule 21.—Penalty for Failure to Comply With Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

Rule 22.—Agreed Statement of Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

Rule 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk. No motion to certify any case to the Supreme Court will be entertained nor shall any such motion be filed by the clerk. See Barnett et al. v. Colonial Hotel B. Co., 119 S. W. 471; 177 Mo. App. 477.

Ordered by the court that rule 24 is amended to read as follows:

Rule 24—Oral Arguments. When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, time consumed by either party in statement and arument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument of the argument of the case, shall otherwise order: *Provided, However,* in any case; and *Provided Further,* that in appeals or writs or error in causes orlinating elswhere than in the Courts of Common Pleas or the Circuit Courts the time for argument shall not exceed thirty minutes on each side unless the court for cause shown and before the commencement of th argument shall grant further time

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Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court in extenso the written or printed argument on file, nor from the reports or text books.

Promulgated October 4, 1916.

Rule 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

Rule 26.—Motion for Affirmance. On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Rule 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 28.—Allowance to Garnishees. Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

Rule 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attor-

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ney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

Rule 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

Rule 31.—Withdrawing Records. No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

Rule 32.—Repeal of Former Rules. All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

Rule. 33.—In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.

Rule 34. An appellant having filed a certified copy of the order granting an appeal,

(a) Need not abstract the record entries showing the steps taken in the trial court to perfect such appeal. If the abstract

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states that the appeal was duly taken, then, absent a certified transcript of the record showing to the contrary, it will be presumed that the proper steps were taken at the proper time and term.

(b) No appellent or plaintiff in error need abstract record entries evidencing his leave to file or various extensions of time granted for filing, a bill of exceptions, but it will be sufficient if his abstract states that the bill of exceptions was duly filed.

The burden, in either of the above paragraphs a or b, will then be upon the respondent or, in writs of error, upon defendant in error, to produce in this court a transcript of the record, or of as much thereof as is necessary, duly certified by the clerk of the trial court, showing the contrary to be the fact, if he make the point.

(c) When the respondent or defendant in error desires to challenge the abstract of the record for any of the above defects, he shall give notice in writing to the opposite counsel, which notice shall be served upon such counsel within ten days after the abstract has been served, failing which, no such objection will be entertained. Such notice, shall, at least five days after service thereof, be filed with the clerk of this court, together with certified transcript of record above required.

[Adopted December 14, 1912.]

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RULES OF PRACTICE

IN THE

SPRINGFIELD COURT OF APPEALS.

Adopted August 19, 1909.

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the court room.

RULE 2.—Words Appellant and Respondent, what they include. Whenever the words appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

RULE 3.—Motions. All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

RULE 4.—Hearing of Causes. Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

RULE 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

RULE 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove,

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then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

RULE 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

RULE 10.—Duty of the Clerk in Making up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 190—, executed on the — day of — 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served. In those cases where the appellant shall, under the provisions of section 2048, Revised Statutes of 1909, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

RULE 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record.

RULE 14.—Abstracts, when Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty days before the day on which the cause is set for hearing, and file

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six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

RULE 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over deeds or other documentary evidence, the abstract shall set out the substance of the same. The evidence of witnesses shall be stated in a narrative form, except when the question and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned. Unless the abstract conforms to this rule, costs will not be allowed for printing the same, and such abstract may be disregarded by the court.

Provided: In all cases wherein there are statements or other evidence in the printed abstracts of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal, and any statement that the bill of exceptions was signed, sealed or made a part of the record will be taken to be a statement that said bill of exceptions was signed, sealed and filed and made a part of the record at the proper time and in the proper manner, such abstracts shall be deemed sufficient as to any of the aforesaid matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be a sufficient objection to state that the abstract does not show such steps were taken in proper time or in a proper manner, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time or in proper manner as the case may be, and thereupon, the Court shall determine the matter and the costs thereof shall be taxed as the Court shall deem just.

RULE 16.—When Appeal Is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 2048, Revised Statutes 1909, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

RULE 17.—Costs, when Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 2048, Revised Statutes 1909, which fails to make a full presentation of all the record nec-

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essary to be considered in disposing of all the questions arising in the cause.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts.

RULE 18.—Briefs, what to Contain and when Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

RULE 19.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

RULE 20.—Continuing and Resetting Cases. No case shall be reset or continued, or time extended for filing statements, abstracts or briefs, on mere agreement of counsel, but only for sufficient cause shown, and by order of the court. (Effective December 1st. 1910.)

RULE 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

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RULE 22.—Agreed Statement or Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

RULE 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

RULE 24.—Oral Arguments. When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided* further, that in appeals in causes originating before a justice of the peace, the time for argument shall not exceed thirty minutes on each side.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

RULE 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 26.—Motion for Affirmance. On motion for affirmance under section 2047, Revised Statutes 1909, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

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RULE 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 28.—Allowance to Garnishees.—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

RULE 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney, shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

RULE 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

RULE 31.—Withdrawing Records. No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

RULE 32.—Record Entries Perfecting Appeal not to be Abstracted. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

Hereafter no appellant need abstract record entries evidencing his leave to file, or filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Anything in any rule to the contrary is hereby abrogated.

Adopted March 3, 1913.

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